(A)

No. 87-5277

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TONY B. AMADEO,

Petitioner,

v.

RALPH KEMP, Warden,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 10, 1987
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TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
County Prosecutor's Memorandum to Jury Commissioners	2
Excerpt from Testimony of R.W. Dennis, Sr., County Court Clerk and Secretary to Jury Commissioners, *Bailey* v. *Vining*, Civ. A. No. 76-199-MAC (M.D.Ga. August 15-17, 1978)	5
Excerpt from Petitioner's Supplemental Brief on Direct Appeal to the Supreme Court of Georgia	12
Testimony and Exhibits Before the United States District Court for the Middle District of Georgia, November 14, 1985	19
William A. Prior	19
E.R. Lambert	30
Christopher Coates	41
C. Nelson Jernigan	54
Petitioner's Motion for Change of Venue	61
Petitioner's Motion for Continuance	63
Opinion of the Supreme Court of Georgia, May 2, 1979	66
Order and Memorandum Decision of the United States District Court for the Middle District of Georgia, May 17, 1984	71
Opinion of the United States Court of Appeals for the Eleventh Circuit, September 30, 1985	82
Order and Memorandum Decision of the United States District Court for the Middle District of Georgia, November 14, 1985	90
Majority Opinion, United States Court of Appeals for the Eleventh Circuit, June 18, 1987	94
Dissenting Opinion, United States Court of Appeals for the Eleventh Circuit, June 18, 1987	106

TABLE OF CONTENTS—Continued

	Page
Order of the United States Court of Appeals for the 11th Circuit denying rehearing, June 8, 1987	119
Judgment, June 16, 1987	120
Order of the Supreme Court of the United States granting certiorari and leave to proceed *in forma pauperis*, October 19, 1987	121

RELEVANT DOCKET ENTRIES

September 29, 1977	Offense Date
November 30, 1977	Petitioner Convicted and Sentenced to Death, Putnam County, Georgia
May 2, 1979	Convictions and Sentence Affirmed, Supreme Court of Georgia
February 29, 1980	Denial of Petition for State Habeas Corpus, Superior Court, Putnam County, Georgia
September 10, 1980	Denial of Certificate of Probable Cause to Appeal Denial of State Habeas Corpus Relief, Supreme Court of Georgia
May 17, 1984	Order and Memorandum Decision of the United States District Court for the Middle District of Georgia Granting Habeas Corpus Relief
September 30, 1985	Opinion of the United States Court of Appeals for the Eleventh Circuit Remanding to the District Court
November 15, 1985	Order and Memorandum Decision of the United States District Court for the Middle District of Georgia Finding Cause and Prejudice
June 18, 1987	Opinion of the United States Court of Appeals for the Eleventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

Civ. A. No. 84-76-1-MAC

TONY B. AMADEO

v.

RALPH KEMP, Warden

COUNTY PROSECUTOR'S MEMORANDUM TO JURY COMMISSIONERS *

TRAVERSE JURY

	125 B.F.		
7 Names	75 W.F.		
Traverse	8 W.F.	(18-24 yrs of age)	
7	04 B.F.	(19-24 yrs of age)	= 212 Female
	8 W.M.	(18-24 yrs of age)	
	4 B.M.	(18-24 yrs of age)	

GRAND JURY

	46 BF	9	37	
Names	30 WF	7	23	
Grand	2 BF	(21-25 yrs of age.		
	2 BM	"	"	"
	2 WF	"	"	"
	2 WM	"	"	"

---

* A copy of the memorandum was entered into evidence before the district court. [Transcript of November 15, 1985 Hearing at 63]. For the convenience of the Court, the memo is reproduced in printed form, as well as in its original handwritten form.

Result:

Traverse Jury			
485 Males 60%	Pop.	%	48.4
322 Women 40%	"	"	51.6
298 Black 37%	Pop.	%	42.1
509 White 63%	"	"	51.6
24 18-24 age 2%	"	"	17.2
Grand Jury			
226 Males 70%	Pop.	%	48.4
96 Women 30%	"	"	51.6
101 Black 31.4%	Pop.	%	42.1
221 White 68.6%	"	"	51.6

Traverse Jury

125 B.F
75 W F
8 W F (18-24 yrs of age)
04 B.F. (18-24 yrs of age)

= 212 Female

8 W.M. (18-24 yrs of age)
4 B.M. (18-24 yrs of Age)

Grand Jury

46 B F (9) 37
30 W F (11) 93
2 B F (21-25 yrs of Age.
2 B M .. .. ..
2 W F .. .. ..
2 W M .. .. ..

Result:

Traverse Jury

485	males	60%	pop. %	48.4
322	Women	40%	.. ..	51.6
298	Black	37%	pop. %	42.1
509	White	63%	.. ..	51.6
24	18-24 age	2%	.. .	17.2

Grand Jury

226	males	70%	pop. %	48.4
96	Women	30%	. ..	51.6
101	Black	31.4	pop. %	42.1
221	White	68.6	.. ..	51.6

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

Civ. A. No. 76-199MAC

BAILEY

v.

VINING

EXCERPT FROM TESTIMONY OF R.W. DENNIS, SR.

County Court Clerk and Secretary to Jury Commissioners,
(August 15-17, 1978) [at 112-120]

BY MR. COATES:

Q Would you state your full name, please, for the record?

A R. W. Dennis, Sr.

Q And Mr. Dennis, do you hold an official office in Putnam County?

A Yes, I do.

Q And what position is that?

A That's Clerk of the Superior Court.

Q And that's an elected position?

A Yes, it is.

Q And how long, sir, have you held that position?

A 18 years.

Q So you were elected for the first time in 1960?

A '60. Yes.

Q Mr. Dennis, what was the situation concerning black representation on the traverse jury in 1960 when you were clerk of the court. Let me first ask, did you bring the minute book?

A Yes, I did. 1938 to 1977. What year was that?

Q 1960.

THE COURT: What is it you are asking him now, please?

MR. COATES: The racial composition of the jury list.

THE COURT: If he knows it? Do you have such figures, Mr. Dennis?

THE WITNESS: No sir, not the racial composition.

THE COURT: Ask him something else, please.

Q MR. COATES: I would ask you to look with regard to 1960. Would you look at entry No. 220 on the master traverse jury list?

A 220?

Q Yes sir.

A All right.

Q And that name is John Brown?

A No sir. It's Mrs. Charlie Hawkins.

Q That is 1960?

A Wait. I'm sorry. Did you say grand or traverse? You said traverse, didn't you?

Q This would be grand.

A John Brown. Right.

Q And that's marked colored?

A Right.

Q Are any other names on the list marked by color?

A No sir.

Q Would it be correct to say that Mr. John Brown was the only black on the master grand jury list in 1960?

A I have no idea. I couldn't tell you whether all these people are black or white. I would say that by him being set out he was colored, that he was colored.

Q If there were other black people on the list or other colored persons, would the name have been marked just like Mr. Brown's?

A I guess so. Mrs. Marshall was clerk. She handled this list. I didn't have anything to do with it.

Q Now looking to the 1960 traverse master jury list, isn't it true that there are 547 names on it?

A That's correct.

Q And the last person is Mr. Roy Bowden?

A That's correct.

Q And he is marked colored?

A That's correct.

Q Are any of the other 546 names marked colored?

A No sir, they are not.

Q Now having perused those records, Mr. Dennis, is it fair to say that in 1960 a segregated jury list was kept by Putnam County?

A Yes, according to this book.

Q Is it true to say that there was one black person on the master grand jury list and one black person on the traverse jury list?

A That's correct.

Q Did you meet with—as secretary did you meet with the board of jury commissioners in 196[illegible]?

A No.

Q Did you have an occasion to meet with them in 1962 when the new list was drawn up?

A Yes, I did.

Q Was there any discussion at that time concerning the under-representation of blacks on the grand and traverse jury lists?

A Yes, there was.

Q And what was done in 1962?

A They were all put in together. I don't know which are black and which are white. They are not designated

Q The list was desegregated?

A Yes sir.

Q Was any reason why that practice was commenced?

A Yes. I didn't like the practice of doing that.

Q So you specifically requested it?

A I requested the jury commissioners to let's put them all in alphabetical order.

Q You could tell from the 1960 list that blacks had been severely under-represented?

A Yes sir.

Q Did you make any request that something be done to correct that practice?

A Yes.

Q And what did you request?

A I requested that more blacks be put in the jury box.

Q How many blacks were put in the jury box?

A I don't have any idea. They are not designated on this list. I will say that they were taken from the tax digest at that time instead of voters list.

Q In 1967 did the jury commissioners get correspondence from Solicitor Lawrence?

A 1967?

Q Yes sir. Concerning the under-representation of blacks on the traverse and grand jury lists?

A I don't have a copy of that letter.

Q Would you refer to the 1967 minutes, please?

A We didn't meet in '67.

Q There would have been a '66 meeting to draw up names for two years, but then there was a '67 list, was there not?

A That's correct.

Q And prior to the time that meeting was held, did the jury commissioners, or did you get correspondence from Solicitor Lawrence concerning the under-representation of blacks on the master grand and traverse jury lists?

A I'm not saying we got written communication but we did have a recommendation from Solicitor Lawrence that we send out questionnaires to everyone on the—not on the jury list, on the voters list.

Q Did you have oral communication with Solicitor Lawrence?

A Evidently we did, yes sir. I don't have anything in writing here. I would have kept a letter if he had written it.

Q Did Solicitor Lawrence tell you he had just had a case reversed by the Supreme Court in another county in the judicial circuit that Putnam County is in?

A That's been eleven years ago, Mr. Coates. I can't remember exactly what was said.

Q When were the first black jury commissioners appointed in Putnam County? Well, let me ask you specifically, is it true that the first black jury commissioners in Putnam County were appointed in 1972 and those two members would have been Jimmy Davis and Tinch Mitchell?

A That's right, and the first time that they sat on the jury commission we met August 5, 6, 7, and 8, 1974.

Q Were there qualified black persons in Putnam County to be jury commissioners prior to 1972?

A Yes.

Q Do you know why no black person had ever been appointed?

A No.

Q In 1977, after Judge Jackson ruled that the jury list needed to be reconstituted, did you receive a memorandum from the office of the solicitor?

A Yes.

Q I will show you what's been marked as Plaintiffs' Exhibit A and ask if you could identify it.

A Yes sir, there's some parts of it missing, but it's immaterial.

Q Sir?

A There's some parts of this copy you have—you don't have some parts on there that I have on a copy of mine. It's immaterial though, I think.

THE COURT: Let me see the complete copy.

Q MR. COATES: In reconstituting the jury list, Mr. Dennis, did the jury commissioners aim at the figures suggested there by the writer of this memorandum?

A Yes, they did. I turned that list over to the chairman of the jury commission.

Q With regards to grand jury, the writer of that memorandum suggested 101 black persons be put on the grand jury list?

A Yes.

Q And that was supposed to bring the percentage up to 31.4 percent?

A Correct.

Q With regards to—

THE COURT: Is this the way the present jury box is made up in your county?

THE WITNESS: Yes sir.

MR. COATES: Your Honor—

THE COURT: Y'all are wasting a lot of time over in that county trying anybody for a crime.

MR. COATES: Your Honor, that's the solicitor. We would suggest that the writer of that memo is telling the jury commissioners how to under-represent blacks but avoid a prima facie case under Fifth Circuit case law.

THE COURT: Yes sir, looks like it.

MR. COATES: No further questions. I'm sorry—excuse me.

Q MR. COATES: Mr. Dennis, is this exhibit a copy of the memo that was received from the solicitor's office?

A Yes, it is.

MR. COATES: No further questions.

THE COURT: All right, you gentlemen want to examine the witness?

BY MR. VEAL:

Q Mr. Dennis, how long have you been clerk?

A 18 years.

Q Have you ever known any black to be denied entrance into your office?

A No sir.

Q Had any trouble coming into your office or any office in the courthouse?

A No sir.

Q Or in any election which you might have had occasion to observe?

A No sir.

MR. VEAL: That's all.

THE COURT: Any other questions? All right, call your next witness.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

TONY B. AMADEO

v.

RALPH KEMP, WARDEN

EXCERPT FROM PETITIONER'S SUPPLEMENTAL BRIEF ON DIRECT APPEAL AT 1-7

This supplemental brief, filed to aid the court in consideration of this error, is authorized under Rule 17 of the Honorable Court and by leave of Court during oral arguments on January 15, 1979.

COUNT FOUR (A)

THE JURY LIST AND BOX FROM WHICH DEFENDANT'S JURY WAS DRAWN WAS UNCONSTITUTIONAL AS A MATTER OF FACT AND LAW.

The jury list and box from which the jury in this case was drawn was found to be unconstitutionally composed as a matter of fact and law by the Middle District Court of Georgia in the case of *Willie Bailey, et Al vs. Roy L. Vining, et Al*, Georgia No. 76-199-MAC. This defect was a matter of violation of the Georgia statute law (Ga. Code Ann. §59-108) as well as a violation of United States Supreme Court Decisions.

Attached to this supplemental brief is exhibit "A" which is the order of the Court in the above cited case as well as a transcript of the applicable portion of the evidentiary hearing, as exhibit "B".

The conclusion of this case is clear. The jury source was tainted as the list and box were not constitutionally valid.

The Court found in this case that there had been intentional underrepresentation of Blacks and women which amounted to systematic exclusion of discrete groups in the community.

The Federal Court received in evidence a memo written by the prosecutor's office of Putnam County. This handwritten memorandum, attached as a part of Exhibit "B" instructed the jury commissioners to put numbers of Blacks on an underrepresented basis, but within the guidelines set by the case of *Swain v. Alabama*, 380 U.S. 202, 13 L.Ed.2d 759, 85 S.Ct. 824 (1964), which held that 10% disparity was not enough to make out a prima facie case on percentages alone and the case of *Prestone v. Mandeville* 428 F.2d 1392 (5th Cir.) (1970) which held that 14% was enough to make out a case. The handwritten memo, it is clear, puts the prearrayed figure in this range. The result is a list which is not representative, but would discourage or prevent jury challenges.

While this procedure was an ingenious method of underrepresenting women, Blacks and youth by purposeful selection on the part of the State and the jury commissioners, it denies the defendant the right to be judged by a jury of his peers.

The concept of the right to be judged by a jury of one's peers is as old as the *Magna Carta*. ". . . peers of a Crown Tenant were his fellow Crown Tenants." W. McKenzie, Magna Carta 379 (2nd Ed.) Chapter 39. The concept has been a continuing and refining element of American law. The United States Supreme Court, in 1880, defined the fundamental nature the right in the case of *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 665 (1880). The Court stated, "The very idea of a jury in a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine: that is, of his neighbors, fellow associates, persons having the same legal status in society as that which he holds."

It is now clear in the law that to determine if a jury is a constitutionally acceptable cross-section of the community, or a jury of the defendant's peers, they must look beyond facially valid statutes and inquire into the practices of jury commissioners in order to assure itself that the Constitution was not being subverted. (*Neal v. Delaware*, 103 U.S. 370, *Martin v. Texas*, 200 U.S. 316, *Brownfield v. South Carolina*, 189 U.S. 426, *Smith v. Mississippi*, 162 U.S. 592). *Whitus v. Georgia*, 385 U.S. 545, 551, 87 S. Ct. 643, 17 L.Ed. 2d 599, (1967) and *Castenada v. Partida*, 430 U.S. 482, 97 S. Ct. 127, 51 L. Ed. 2d 498 (1977).

The fact that the defendant was not a minority person or among the class of persons underrepresented on the jury, does not diminish his right to have a constitutionally acceptable cross-section of the community as the jury list *Taylor v. Louisiana*, 419 U.S. 522, 42 L.2d 2d 690, 95 S. Ct. (1975).

As the Middle District Court found in the *Bailey* case, the memo which projected the lowest number of Blacks, women and youth that could be placed on the jury in order to "get by," was evidence of discrimination. (See attached order of the Court). The further conclusion of the Court was that the jury list could not be used to provide jurors for any further criminal trials.

COUNT FOUR (B)

THERE WAS NO WAIVER OF DEFENDANT'S RIGHT TO A CONSTITUTIONALLY COMPOSED JURY BECAUSE THERE WAS NO OPPORTUNITY TO DISCOVER THE PURPOSEFUL DISCRIMINATION.

The Georgia Courts have recently taken a strict line on the timing of challenges to the jury *Anderson v. State*, 233 GA 174, 154 S.E. 2d 246 (1967). The Georgia Supreme Court has held that if the defendant is represented by counsel at the committal hearing and does not raise

the grand jury issue before indictment it is deemed waived, *Hager v. State*, 138 Ga. App. 666, *Mehan v. Statem* 232 Ga. 470, 471(2), 207 S.E. 2d 457 (1974), *Scott v. State*, 121 Ga. App. 458.

The various cases in the Georgia Court of Appeals and the Georgia Supreme Court decided after 1968 were decided on the same analysis of *Anderson* even though *Anderson* was reversed by the United States Supreme Court in 1968. See *Anderson v. Georgia*, 390 U.S. 206, 19 L. Ed. 1039, 88 S. Ct. 902 (1968). The Supreme Court simply reversed the Georgia Supreme Court citing *Whitus v. Georgia* 385 U.S. 545, 17 L. Ed. 2d 599, 87 S. Ct. 643. While the *Whitus* case reversed two Georgia convictions on *both* grand jury and and traverse jury issues there was not a clear ruling on the issue of waiver by untimeliness. The status of Georgia law on timeliness and waiver seems to be unclear in that the *Anderson* case was reversed, but there is no specific language relating to waiver.

The law is clear, however, that failure to timely raise the objection may be deemed not a waiver under special circumstances. In *Barrow v. State*, 239 GA 162(1) (1977) the Court stated:

> "Barrow was indicted on April 21, 1975. Although he was represented by counsel from February 11, 1975, no motion was made regarding the composition of the grand jury. Barrow was tried, convicted and given the death sentence for murder, but his conviction was overturned by this court and sent back for a new trial. *Barrow v. State*, 235 GA 635 (221 S.E. 2d 416) (1975). Barrow then filed his challenge to the grand jury, which the trial court overruled as not timely. We, however, because of the special facts of this case, reverse the trial court on this point."
>
> "The general gule is that the grand jury composition must be challenged prior to indictment unless

the defendant shows he had no actual or constructive notice of the illegality. *Sanders v. State*, 235 GA 425(219 S.E. 768)(1975); *McHan v. State*, 232 GA 470(207 S.E. 2d 457)(1974); *Williams v. State*, 210 GA 665(82 S.E. 2d 217)(1954). Failure to do so is deemed a waiver. *Cobb v. State*, 218 GA 10 (126 S.E.2d 231)(1962). Under these general rules Barrow's challenge would indeed have been filed too late."

"We have also said, however, that 'it is a lawyer's proper function and duty to determine whether it is to the interest of his client to raise the issue of systematic exclusion. *Cobb v. State*, 218 GA 10, 24(6)(126 S.E. 2d 231)(1962).' *Burkes v. Whitley*, 221 GA 108, 109(143 S.E. 2d 171)(1965). In his testimony at the hearing on Barrow's motions, the public defender, who had represented Barrow at his first trial, made very clear that he had not considered making such a challenge, even though he realized under our cases he probably would have been successful."

While the *Barrow* case mixes the question of effective assistance of counsel with the timeliness and waiver issue the relevance of the case to the case *sub judice* is clear. 1) The rule that a challenge to grand jury must be made prior to indictment is a general, and not absolute rule. 2) Lack of notice is an exception. In this case the screw turns in a different way. Here the lawyers, no matter how effective, could not have known of this insidious defect in the jury selection process until it was unearthed in the Federal proceedings. The lawyers raised the issue in the trial court below by way of Notice of Appeal and Enumeration of Error, *at the earliest possible time after notice of the defect.*

The above analysis would as well apply to the timeliness question of a challenge to the array of the trial jury under Georgia Code Section 59-803, *Bryan v. State*,

124 GA 79, 80, 52 S.E. 298 (1905), *Williams v. State*, 31 Ga. App. 173(3), 120 S.E. 131 (1923).

Specifically, the reason that the defendant's lawyers could not have known of this defect was that an examination of the statistics on the representation of various cases would not have lead the lawyers to conclude that a *prima facie* case on the percentage disparity could be made out. In fact this was the apparent purpose of the memo. Further, there was available to the defense counsel no means to discover this unofficial directive or memo which was not a part of the public record.

Therefore, there was no notice of the actual defect and no means to discover it which means that it would have been impossible to discover the defect before trial. To conclude otherwise would put an ornerous and perhaps impossible task on defense counsel and the Court. The conclusion that it *might have been* possible for defense counsel to discover this in a hearing would put defense counsel in the position of having to bring a jury challenge in every case would conduct a full hearing and examine every person connected with the jury selection process including the District Attorney, his staff, the Judge who drew the jury and a host of other court personnel.

The burden placed on the defendant unrepresented by counsel by such a conclusion is obvious. Even when represented by counsel, the defendant cannot rely on the failure of his lawyer to raise such claims to be available in *Habeas Corpus*. *Durham v. State*, 239 GA 697, 701 (6) (1977).

If defense counsel and defendant are deemed to have waived such a hidden issue by failure to timely raise such issues, the increased burden on the administration of justice is obvious.

A persuasive holding on the relationship of timing and the concern for orderly administration of justice is found in *New York v. Attica Brothers*, 359 N.Y. S. 2d 699.

"The cases, however, leave no doubt that a defendant's constitutional and common law right to a trial by a jury of his peers and to the equal protection of the laws under the Fourteenth Amendment create, as an essential corollary, the right to assert the failure of those charged with the jury selection process to comply with the Constitutional guarantee and all State statutes, rules and regulations enacted to implement it."

"The objections to the timeliness of the motion and to the lack of statutory authority for its initiation must yield to the overriding consideration that a present resolution of this question is necessary for the orderly administration of justice."

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

(Title Omitted in Printing)

TESTIMONY OF WILLIAM A. PRIOR

[Transcript of November 15, 1985 Hearing at 7-21]

Q Your Honor, would you state your name for the record, please?

A William A. Prior.

Q And what profession are you in?

A I'm Superior Court Judge for the State of Georgia.

Q And how long have you held that position?

A Approximately four and a half years.

Q And prior to that, where did you practice law?

A I practiced law in Madison, Georgia and the surrounding counties.

Q Have you ever represented criminal defendants in the Superior Court of Putnam County, Georgia?

A Yes, I have on a good many occasions.

Q And did you represent the Petitioner in this Federal Habeas Corpus action, Mr. Amadeo?

A In the Federal Habeas Corpus action?

Q No. The Petitioner in this action, did you represent him at trial?

A Yes, I did. Mr. E. R. Lambert and I were appointed by Judge Joseph Duke to represent him.

Q I realize it's been quite some time but do you recall when in the course of the proceedings you were appointed to represent Mr. Amadeo?

A As I recall, the incident happened on the 29th of September and I would say, we were appointed no more than four days later so somewhere early in October, I was appointed and started to prepare the case.

Q Were both you and Mr. Lambert appointed at the same time?

A Yes, we were.

Q In preparing for trial, did you consider filing any types of motions to challenge the Grand or Traverse Juries in Putnam County?

A Yes, we did. We filed numerous motions; I don't recall all the motions we filed but we filed numerous motions. We filed a Motion in Limine trying to get the Judge not to let the District Attorney to introduce evidence of other crimes; there'd been some other incidents and we anticipated that he would attempt to introduce those as showing motive and identity and that type of thing. We filed that motion that I specifically recall. We filed numerous other motions and we considered filing a challenge to the array. I recall that very specifically. We had a list of the jurors and we met with an attorney in Putnam County who'd been there for many years, Mr. Dallas Veal. We knew—personally knew or had some knowledge of many of the jurors that were on the list that we had been furnished, both on the Grand and Traverse Jury. After conferring, as I recall, most of one afternoon with Mr. Veal and going over the jurors name by name and item by item, we decided not to file a challenge. The reason being that we frankly thought that if we filed it in one, we could wind up in worse shape than we were. There were certain people on the Jury that we thought that would be favorable to us on the panel. So, all things considered, we did consider it, and decided not to file.

Q Did Mr. Veal ever become a formal member of the trial team for Mr. Amadeo?

A No, he did not. I don't even think he sat with us during the Jury selection process, although I'm not certain about that.

Q In meeting with Mr. Veal, what, if any, discussions did you have about the number of black people or women that were on the list that you looked at?

A Well, I don't recall whether we had a conversation in regard to the numbers that were on there but—

THE COURT: Let's bear in mind that Mr. Veal is deceased, isn't he?

WITNESS PRIOR: Yes sir.

MS. BOLEYN: Yes sir, he is.

THE COURT: Does that inhibit this line of questioning?

MS. BOLEYN: Perhaps Your Honor, I'll just rephrase my question.

Q MS. BOLEYN: What, if any, consideration did you give to the Jury list as far as determining numbers of black people or women on that list?

A We identified on the Jury List each juror, prior to trial, in regard to whether they were black or white so we knew the actual numbers on the Traverse List, who was black and who was white and as I recall that, they were approximately evenly divided.

THE COURT: Now, you're talking about the array?

WITNESS PRIOR: Yes sir, the array.

THE COURT: You're not talking about the Master Jury List, are you?

WITNESS PRIOR: No sir, we're talking about the array that was put on us for that trial, as I recall, there was something like 120 jurors, maybe 110 jurors.

Q MS. BOLEYN: What, if any, investigation did you do with reference to the Jury Pool versus the people in the population, the black population and white population with reference to the Jury Pool itself as opposed to the array?

A To determine whether or not we were likely to win a challenge to the array?

Q Yes.

A I don't recall that we did any specific—the main investigation that I recall is our long discussions with Mr. Veal and other people in the county as to individual jurors. 'Do you know this person? Tell us about this person. What does this person do? Is this person black or white? How long has this person been in the county?

Does this person have any connection in any way with the victim?' That type of thing.

Q Did you make any compilation of the percentages, either on the array or in the Jury Pool with reference to black people or women?

A Again, we identified each person as man, woman, black, white and I recall—I think I recall that on that particular array; that is, that 110 or 120 jurors, the black/white situation was approximately even. There were numerous women. I don't remember the percentage. I do not recall being aware of the exact percentage of the black population of Putnam County and whether the entire Master Jury List would have met that—the requirements of that. Probably not and I probably was aware of that but I guess the point I want to make is that I did consider—Mr. Lambert and I did consider challenging the array and it was a tactical decision on our part not to challenge the array because of the fact that we had gone over the list with Mr. Veal; we felt like we had about as good a Jury List as we could get. We were aware of the fact that the District Attorney was likely to be able to introduce other crimes and these other crimes involved the white defendants, all of whom were white, Mr. Amadeo, Mr. Colter and Mr. Conwall assaulting black victims; that is, in Alabama where allegedly another victim had been killed and in, I believe, Mississippi, where another victim had been assaulted and not killed but left in pretty bad shape and we were somewhat concerned about black members of the Jury or a heavily black Jury from that standpoint. I'm not certain of the actual racial makeup of the twelve member Jury. As I recall though, it was approximately evenly divided.

Q What, if any, knowledge did you have at the time that you represented Mr. Amadeo of prior Jury challenges to the Putnam County Master Jury List?

A I don't recall that I had any, although I do recall being aware that that had happened in other counties and I cannot sit here under oath and tell you that I was aware

that a challenge was anticipated in Putnam County or probably would come in Putnam County or that it would've been one, if it had been instituted. I can't say that; I can say that I had a general knowledge of that area of the state at the time and if you had asked me to guess, I probably would've told you that it would not have met the required percentages but I can't specifically say that; I can't specifically say that I keyed on that or that that was the basis of my decision. The basis of Mr. Lambert's decision or, at least my decision was a tactical decision based on a practical investigation as to who these particular jurors were. There were several factors; I don't think I mentioned the religious factor. There was at that time in Putnam County a very active charismatic religious group. I don't remember the exact name of the group; the word "Shepard" was in it somewhere, I think, but at any rate, it was very active, had a relatively large following in Putnam County and several of these people had visited the defendants in jail and we knew there were several people on that particular 110 or 120-person panel who were involved in that and that was another reason for thinking we were doing about as good as we could do so we made a tactical decision, a knowing, tactical decision not to challenge the array.

Q Did you discuss your tactical decision in that regard with Mr. Amadeo?

A I don't recall whether we did or not. In general, we discussed our thoughts with Mr. Amadeo and asked for his thoughts and I cannot specifically say I remember discussing or not discussing whether to challenge the array and I'm sure we didn't discuss every tactical decision we made during the course of the preparation for the trial or the trial itself with Mr. Amadeo or the other defendants.

Q At the time of your representation of Mr. Amadeo, what, if any, knowledge did you have, Judge Prior, with reference to a memorandum that was apparently written by someone in the Assistant Solicitor or Assistant District

Attorney's Office to the Jury Commissioners concerning the percentages of blacks and women to be included on the Master Jury List?

A I assume you're referring to the memo that played a part in the case of *Bailey vs. Vining*, which happened after this trial took place. I do not recall having any knowledge of that memo at that time, although at a later time and prior to the time we instituted the appeal in this case, Mr. Lambert and I represented Mr. Amadeo on the initial appeal to the Georgia Supreme Court, we did become aware of it and did put that as one of our errors in the appeal. At that time, frankly speaking again, we wanted everything we could get in the appeal. We had lost in Mr. Amadeo's case and we wanted to raise every issue we could raise and we did raise that issue on appeal but that probably was the first time I had any knowledge; I certainly do not remember being aware of any memo at the time of this trial.

Q Judge Prior, do you have any more specific recollection of when between his conviction and his appeal, you might've become aware of the memo?

A No, I don't. I do recall that we filed a motion for new trial, which is the normal practice in Georgia, as I'm sure you know, and the transcript probably didn't—we probably didn't get the transcript for six or seven months; it was a long transcript, relatively long, but somewhere in that time period, the time period between the end of the trial and the filing of the appeal, we were aware of the *Bailey vs. Vining* case and we did mention that in one of the enumerated errors, Number Four, as I recall, although I'm not sure of that.

Q When did your representation of Mr. Amadeo end?

A At the time we received the remittitur from the Georgia Supreme Court denying the appeal.

Q And you and Mr. Lambert both participated on appeal in writing the brief?

A We both participated in writing the brief; we both appeared in the Supreme Court and argued the case.

MS. BOLEYN: Nothing further, Your Honor.

CROSS EXAMINATION

BY MR. WARNER:

Q Judge Prior, you talked with Dallas Veal, who is now deceased, during 1977 before trial, is that right, sir?

A That's correct, on several occasions, one of which was a lengthy discussion where we went over the Jury List item by item.

Q What you had—excuse me, sir.

A Excuse me, go ahead.

Q What you had at that time was a list of the venire, is that right?

A That's correct.

Q And Mr. Veal never mentioned anything to you about any memo from the DA's Office that was brought up on direct, did he?

A Not that I recall, no sir.

THE COURT: You all might want to perfect the record to show that Mr. Veal was an individual attorney practicing law by himself in this community and as far as I know, with no connection to the District Attorney's Office, then called the Solicitor's Office. That's right, isn't it?

WITNESS PRIOR: That is correct, yes sir. He may have—I don't recall whether his step-son, Don Huskins, was with him at that time or not; he may or may not have been but he had no connection whatsoever, to my knowledge, with the District Attorney's Office or the County; I don't think he ever represented the County.

Q MR. WARNER: He did represent the City of Eatonton, is that correct?

A Correct, yes.

Q And as a matter of fact, he was one of the attorneys in the *Willie Bailey* case, right, that represented one of the defendants?

A I'm certain he did. I vaguely remember that; I'm sure he did though. He was the City Attorney down there for years.

MR. WARNER: Your Honor, I would like two exhibits marked as Petitioner's Exhibit 1 and 2, if I could, please sir.

Q MR. WARNER: Judge, as a part of your representation of Mr. Amadeo, you filed various pre-trial motions. You already mentioned a Motion in Limine to try to keep out other crimes, evidence, is that right?

A That's correct.

Q And you also filed a motion for a continuance?

A Yes sir, we did.

Q And a motion for a change of venue, is that correct?

A That's correct, and I think some other motions although I don't recall specifically what.

THE COURT: Excuse me for interrupting you all. I'm looking at the docket sheet in *Bailey v. Vining*. Mr. Veal's son-in-law, Donald Huskins, is shown as the attorney for the Defendants Marshall, Vining, Ridley, Culver, Holley, Winslette, Lynch and Cunningham and also for the Defendant Tax Assessors. And I seem to recall that in that capacity that Mr. Veal came with Mr. Huskins; I'm not sure.

WITNESS PRIOR: He may have, Judge, I don't remember that; I don't recall.

THE COURT: I'm just going by the docket sheet.

Q MR. WARNER: Judge Prior, I show you what I've marked as Plaintiff's Exhibit No. 1 and ask you if you can identify that document. I think the first page is just a certification from the Putnam County Superior Court.

A Yes, I identify Plaintiff's Exhibit 1 as a copy of a Motion for Change of Venue filed in the case of the *State vs. Tony B. Amadeo, William S. Conwall, David L. Colter*, Putnam Superior Court by myself and Mr. Lambert.

Q And I'll show you in the same regard Plaintiff's Exhibit No.—Petitioner's Exhibit No. 2 and ask you if you can identify that, please sir.

A Yes. I identify Plaintiff's or Petitioner's Exhibit 2 as a copy of a Motion for Continuance filed by Mr. Lambert and myself in the same case with an Affidavit in Support of the Motion attached.

Q Judge, at this particular point in time, you tied in, meaning during the course of the pre-trial motions, you tied in the Motion for Continuance with the Change of Venue, is that correct, both of them related to passions that were inflamed in the community, that you were requesting a time in March of 1978 for trial, at which time you felt like the passions of the community and so forth would calm down, is that correct? That was one of your considerations?

A Yes, it was.

Q Now, Judge Duke, as a matter of fact, did not rule on these motions—I believe he ruled on the Motion for Continuance prior to trial, is that correct?

A That's my memory. My memory is that he denied the Motion for Continuance but reserved ruling on the Motion for Change of Venue until such time as the Voir Dire had been completed or at least had gotten far enough along to determine whether we were going to be able to select a Jury.

Q So that the Motion for Continuance was denied prior to trial but the Motion for the Change of Venue continued until after Voir Dire was over with, is that correct?

A That's my memory, yes sir.

MR. WARNER: No further questions, Your Honor.

THE COURT: Ms. Boleyn?

MS. BOLEYN: Nothing further, Your Honor.

THE COURT: Judge, as of the *Amadeo* trial, to your memory, had any lawyer practicing in this eight-county circuit ever challenged the composition of the Master Jury List in any county, of the circuit, I mean?

WITNESS PRIOR: Judge, I'm giving you—I'm responding to that and I want to tell you I'm not certain of the answer; I'm not certain of the county. My memory is that one had, although I can't tell you where or who.

THE COURT: In another county?

WITNESS PRIOR: In another county. That's a general answer but that's the best I can do on that.

THE COURT: What was known to you and/or Mr. Lambert and discussed between you all that caused you to consider challenging the Jury List for this county?

WITNESS PRIOR: Well, as I recall, the—and again, I'm having to kind of reconstruct something that happened a good while ago. We considered challenging it and thought we would win if we challenged it.

THE COURT: But I mean what led you to believe you would win if you challenged, that's what?

WITNESS PRIOR: I can't answer that; I think we just had a general knowledge that it probably wasn't statistically right and I don't know—I don't think we had any investigation to back that up. I think we just generally thought that and our thinking was, 'Well, if we do, we'll gain the benefit of a delay if we win, assuming we win because they'll have to redo the Jury Box and we'll have to draw another Jury and at least we'll get a delay.' On the other hand, we had already been through these jurors that we had one at a time and we knew or we thought we knew what we had there and we balanced those two factors and decided not to.

THE COURT: Any questions on account of the Court's questions, either one of you?

MR. WARNER: No, Your Honor.

THE COURT: Thank you very much. Any reason the Judge can't be excused?

MS. BOLEYN: Not from the Respondent, Your Honor.

MR. WARNER: There's not any with us, Your Honor.

THE COURT: All right. If you wish to leave, you may do so or we'll be glad to have you stay. Mr. Warner, call your first witness.

MR. WARNER: Judge, I would call, hopefully just briefly, Mr. E. R. Lambert to the stand.

THE COURT: Incidentally, also while we're getting the chronology straight, the docket sheet in *Bailey v. Vining* shows that only after the hearing in question commenced were the Jury Commissioners added as parties. They were added on the 17th of August after the hearing had commenced on the 15th. Come around and have a seat, Mr. Lambert.

TESTIMONY OF E.R. LAMBERT

[Transcript of November 15, 1985 Hearing at 22-36]

Q Would you state your name and address for the record, please sir?

A E. R. Lambert. I live in Madison, Georgia on North Main Street.

Q What is your occupation, Mr. Lambert?

A I practice law there in Madison.

Q And how long have you so practiced law there?

A Since September of 1950, about thirty-five years.

Q As a part of your practice, did you have occasion to represent people all over the Ocmulgee Circuit, including Putnam County?

A Yes.

Q Back in 1977, were you appointed to Mr. Tony Amadeo's case in Putnam County by Judge Duke?

A I was.

Q And when did you begin to represent him, if you can recall specifically, Mr. Lambert?

A To my recollection, it seemed that the incident happened in September of that year and we were appointed shortly thereafter and Mr. W. A. Prior and I both were appointed to that case and we went immediately to work on it and had numbers of conferences with Mr. Amadeo and his two companions.

Q Now, as a part of your representation of Mr. Amadeo, did you talk with anyone regarding the venire list in Putnam County, Georgia?

A Yes.

Q And who was that, please?

A We possibly talked to several lawyers there but I remember distinctly talking to Mr. Dallas Veal, an older lawyer there who'd been in Putnam County for a number of years.

Q And you filed various pre-trial motions in defense of your client before trial, didn't you, sir?

A We did; we filed a Motion for Change of Venue and Motion in Limine and one or two other motions.

Q Did you file a Motion to Continue—for a Continuance, was that one of the motions you filed?

A I don't recollect but I'm sure we did. We tried to file everything we could think of.

Q Cause you were interested in representing Mr. Amadeo well and helping him; you had a difficult case, is that right?

A Yes sir.

Q I show you, Mr. Lambert, what's been marked as Plaintiff's Exhibit No. 1 and tell you to look over that and ask you if you can identify it.

A Yes sir.

Q What is that, please 'sir? What does that purport to be?

A That's a Motion for a Change of Venue.

Q I'll show you what's been marked as Petitioner's Exhibit No. 2 and ask you if you can identify that, please sir.

A Yes, that's the Motion for Continuance.

Q And that was filed by you and now Judge Prior, is that correct?

A Yes sir.

Q Now, after Mr. Amadeo was convicted and given the death penalty, you continued to represent him for a time after trial, is that correct?

A A short period of time, yes.

Q And I believe you filed his direct appeal in the Georgia Supreme Court, is that correct?

A Yes sir, that's my recollection.

Q And as a part of that appeal, you filed an original Enumeration of Errors, a Brief and then you filed a Supplemental Brief, is that correct?

A Yes sir.

Q And the Supplemental Brief, what did it deal with? Did it deal with the Jury issue?

A It dealt with about three or four issues and my recollection is we brought up the Jury question at that time, yes sir.

Q Mr. Lambert, I'll show you what's been marked as Petitioner's Exhibit No. 3 and see if you can identify those documents. It's a composite document of three different things so take your time and look through it and see if you can identify them, please sir.

A Yes sir.

Q What are those documents, please sir, if you could identify them for the record, please?

A Well, it's a Brief of the Appellate and, of course, it follows the usual form where there is a statement of the case and then the enumeration of errors and argument and then there's a Supplemental Brief also in here, yes sir.

Q What does the Supplemental Brief deal exclusively with?

A I believe it dealt exclusively with the Jury List and Box which the defendants' Jury was drawn.

Q Are there attachments and appendices at the end of that particular Supplemental Brief?

A Yes sir.

Q Are they a part of the transcript and record in the *Willie Bailey* case?

A Yes sir.

Q And I believe as a part of the Supplemental Brief, you maintained that there was no notice of the actual defect and no means to discover it, which means that it would've been impossible to discover the defect before trial, is that what is in your brief specifically on Page Six of the Supplemental Brief?

A What was the question again?

Q Did you mention specifically on Page Six, using this direct language in your Supplemental Brief, "Therefore, there was no notice of the actual defect and no means to discover it," which means that it would have been impossible to discover the defect before trial. Is that what you put in your Brief?

A That's what was—what's in the Brief, yes sir.

Q And that's what you and Judge Prior filed in Georgia Supreme Court, is that right?

A Yes sir.

Q And you well intended what you put in that Brief, didn't you?

A Yes sir. Of course, at that time, you know, the trial was over and we were reaching for straws and doing everything we could to try to follow through.

Q So, if you would've had it to do over again, you would've challenged his array, wouldn't you, according to what you've said there in the Brief?

A Oh, according to what I said in the Brief—

MS. BOLEYN: I object to the question. I don't think it's a question of whether or not he would do it now. The question is did he know and make a conscious decision then. What he found out afterwards, he did the best he could.

THE COURT: Well, it seems to be undisputed that neither Mr. Prior nor Mr. Lambert were aware of the memo from the District Attorney's Office which caused this Court to throw out the Jury Box and further seems to be undisputed that they didn't challenge the Jury in this case so beyond that, I guess this Court will have to draw its conclusion, won't it?

MR. WARNER: Yes sir, Your Honor. Just one thing further.

Q MR. WARNER: Now, when you had talked to Dallas Veal, he of course didn't know anything about this memo cause it hadn't happened, is that right? The *Bailey* case hadn't happened?

A He certainly didn't tell us about it if he knew about it, no.

MR. WARNER: Thank you, sir. He's with you, Ms. Boleyn.

CROSS EXAMINATION

BY MS. BOLEYN:

Q Mr. Lambert, do you recall more specifically when you might've found out about the memo from the Assistant Solicitor that became the subject of the *Bailey v. Vining* case in relation to the end of Mr. Amadeo's trial and the filing of the appeal?

A My recollection is that—of course, this case was tried in 1977 and it was way up in '78 or in '78 sometime after the—I remembert hearing some discussion about the Jury down in Putnam County since I visited that county quite often but it was up in '78 sometime. I don't remember when, no.

Q And you don't recall how you actually received word that the memo existed?

A No, it was generally discussed with the lawyers in the Circuit, if I recollect correctly.

Q And prior to the time that you represented Mr. Amadeo, did you have knowledge whether or not any other successful or unsuccessful jury challenges had been made in Putnam County specifically?

A No ma'am, there were none to my knowledge.

Q And did you practice at the time that you represented Mr. Amadeo in any of the other counties in the Circuit?

A Yes ma'am, pretty much generally in—usually don't get down to Wilkinson County much but I do from as far as Baldwin County.

Q And were you aware whether there were jury challenges either successful or unsuccessful in any of the other counties in the Circuit?

A I was not aware of it.

Q Did you have an opportunity to look at the Master Jury List as opposed to just the Jury Pool for that particular case in making your decision about whether or not to file a jury challenge, if you recall?

A Not the Master Jury List. Of course, we were furnished with just a Jury List. I have my notes here, just a regular Traverse List that was published several weeks probably before the trial and we normally take that, I do, and study it. The marks on there, Judge, were put there by me now.

THE COURT: Oh yes sir, I realize that.

Q MS. BOLEYN: Were you finished? You did not review the Master Jury List if you recall?

A No ma'am. This is the only Jury List we had.

Q On that Jury List that you had, did you make an attempt to find out how many black people were on that list and how many women were on that list?

A Yes ma'am.

Q And how did you go about determining the race or sex of the people on the—

A Well, you can usually tell by the name whether it's male or female, if it's a Mrs., some—the list shows Mrs. before some names and then others, for instance, has Elizabeth somebody and doesn't have a Mrs. but I would assume that was a woman. And then we, in counseling with Mr. Veal, we determined what job people had and what race they were and other significant factors that we thought would be important.

Q And what was your overall impression of the actual Jury List you reviewed as to whether or not it would be a Jury that might or might not be beneficial to Mr. Amadeo?

A Well, we knew we had a tough case but we felt very comfortable with the Jury after reviewing with Mr. Veal some people that we felt was, you know, would not be so wanting to give the death penalty.

Q Did you make any attempt to make any type of statistical analysis of the list that you had as far as how many black people were on there or white people or women?

A No ma'am.

MS. BOLEYN: Nothing further, Your Honor
THE COURT: Mr. Warner?

REDIRECT EXAMINATION

BY MR. WARNER:

Q Just a few further questions, Mr. Lambert. From what Ms. Boleyn was asking you about when you thought you recalled anything in regard to this memo, do you ever recall after the trial of this case, meaning Amadeo's trial in 1977, do you ever recall sometime between there and the end of 1978 having a discussion with Mr. Chris Coates, who was a plaintiff's attorney in the *Willie Bailey* case about the juries in Putnam County but before your direct appeal?

A I was involved in some litigation, I represent the City and we were involved with some litigation that the City was a party to the lawsuit, and Mr. Coates was in Madison quite frequently and in my office quite frequently, and we had talked about the case and I could very easily have discussed this with Mr. Coates. I don't remember the specific instance but along about that time, Mr. Coates and I were talking on the telephone and talking in person and working on this litigation there in Madison.

Q Did you have any discussion with Mr. Nelson Jernigan in regard to this jury issue insofar as preparing for your appeal?

A Yes sir, I did. Nelson Jernigan and I were close friends and had worked together in the Georgia Legislature and I knew of his having some experience in appeals of this type and I did confer with him.

Q You got his input insofar as investigation and facts and law is concerned on the jury issue, is that correct?

A I did.

MS. BOLEYN: Nothing further.

THE COURT: Mr. Lambert, getting back to the discussion that you described among the members of the Bar as to the memorandum from the Solicitor's Office, did that discussion arise after the hearing in this United States Court and the Court ordered revision of the Jury Box?

WITNESS LAMBERT: Judge, it happened after the trial of this case, I'm certain now; whether it happened after the—your decision in the other case in Putnam County, I'm not sure. It seems to me—

THE COURT: What else to your memory could have caused knowledge of the—

WITNESS LAMBERT: Nothing—nothing that I know of. I certainly didn't know about the memorandum, Judge, at any time until way after the case was tried in Putnam County, the '78 case, which is *Bailey vs.*—

THE COURT: Yes sir, *Bailey v. Vining*. In other words, the transcript in this Court shows a hearing took place August 15th through the 17th in 1978.

WITNESS LAMBERT: The *Bailey* case?

THE COURT: The *Bailey* case.

WITNESS LAMBERT: Yes sir. It had to be after that, Judge, in my opinion. Yes, I can't remember for sure but I would certainly hazard a guess to that.

THE COURT: What type of law practice were you personally engaged in at the time you were appointed to represent the Petitioner?

WITNESS LAMBERT: Well, Judge, it's a general country law practice. We do civil work, corporate work; we do criminal work. We do most everything walks in the front door.

THE COURT: Were you a sole practitioner or you—

WITNESS LAMBERT: No sir, I had a partner at that time, Mr. Carter was with me but he did not get involved in this case. He was watching the home fires trying to keep the wolf away back there at the office.

THE COURT: What was the compensation that you and Mr. Prior received for representing Mr. Amadeo under the State system at that time? Was it still $100?

WITNESS LAMBERT: No sir. Judge, it seems to me like Judge Duke gave us a little more than that but it wasn't much. I don't remember exactly what but he—we felt that it was not generous but we felt that—it was more than $100 but I really don't remember; honestly, I don't.

THE COURT: Anyway, under the—I'm just trying to get the facts.

THE WITNESS: Yes sir, I understand.

THE COURT: My recollection from having been a practitioner is coming back, but generally, under our State system, the compensation paid any court-appointed counsel in a capital case in '77 was very nominal, wasn't it?

WITNESS LAMBERT: We had some kind of Bar Association rule and maybe it was $250 or something like that but it seems that because this took an extraordinary amount of time, the Judge gave us a little bit more than that but not much but the standard rule is usually a felony case is so many dollars, misdemeanor so many dollars and we still use that in the Ocmulgee Circuit, yes sir.

THE COURT: Again, I'm not trying to embarrass you or put you on the spot but I must be honest with the record. Would it be fair to say that back in 1977 that lawyers engaged in a country practice in the local community generally hesitated to challenge the Jury List in these rural counties?

WITNESS LAMBERT: Judge, I'd never heard of it and wouldn't have done it, you know. Yes, we would hesitate considerably to do that in a country court. I just—it was very unusual.

THE COURT: Were you nevertheless though aware of the Supreme Court of the United States decisions in like *Whitus v. Georgia* and—

WITNESS LAMBERT: Yes sir.

THE COURT: You knew about that?

WITNESS LAMBERT: I certainly did, yes sir.

THE COURT: Were you aware of the Bibb County Jury Box having been thrown out by the Supreme Court of the United States?

WITNESS LAMBERT: I'm sure I read about it, Judge. I don't remember the date of that, whether it was prior to '77 but it must've been, yes sir; I think it was.

THE COURT: Well, it's *Alexander David Jones vs. Georgia* is the name of the case. I was his lawyer.

WITNESS LAMBERT: Yes sir, I remember the case.

THE COURT: Do you remember that?

WITNESS LAMBERT: Yes sir.

THE COURT: What led you to believe that you ought to even think about challenging the Jury List of this county?

WITNESS LAMBERT: The fact of the *Bailey* case, Judge, I think is the only—

THE COURT: No, I mean—this *Bailey* happened after.

WITNESS LAMBERT: Afterwards, I know, but I thought you were talking about in the appeal. We brought it up in the appeal.

THE COURT: No, I'm talking about at the time that you represented him and were filing motions, what led you to even think about the Master Jury List is what I'm interested in.

WITNESS LAMBERT: Other than these cases that you've mentioned and the fact that lawyers were concerned and interested that that had happened in Georgia and we considered it at the time, I'm sure, Judge, but we felt very comfortable with this Jury. It was about —my recollection it was six blacks and six whites and probably more female than male; it was eight or nine females and we felt like here's a young eighteen-year old boy that we could get a mother on there, she might be

more lenient than somebody that's some hard dairyman. This man that was killed was a dairyman and we stayed away from dairymen altogether, I remember that.

Q THE COURT: I see. What was the ratio composition of the Jury that actually served?

WITNESS LAMBERT: Six and six, six blacks and six whites.

THE COURT: I see. And the men and women?

WITNESS LAMBERT: Either eight or nine women and either three or four men.

THE COURT: Any questions on account of the Court's questions?

MR. WARNER: No, Your Honor.

THE COURT: All right. Thank you very much, Mr. Lambert.

MS. BOLEYN: He can be excused so far as the Respondent's concerned, Your Honor.

MR. WARNER: And so far as the Petitioner also, Your Honor.

THE COURT: Yes sir. You may be excused, sir. Thank you. Call your next witness, Mr. Warner.

TESTIMONY OF CHRISTOPHER COATES

[Transcript of November 15, 1985 Hearing at 37-53]

BY MR. WARNER:

Q For the record, would you state your name and address, please sir?

A My name is Chris Coates and I live at 124 North Point Road in Milledgeville, Georgia.

Q What do you do for a living, Mr. Coates?

A I'm an attorney. I'm in private practice in the law firm of Mathis and Coates.

Q How long have you practiced law in the State of Georgia?

A I moved to Georgia in July of 1976 and I was admitted to practice before the courts of Georgia in 1977 and I have practiced in Georgia since that time.

Q During 1978, did you have occasion to represent the plaintiffs in the *Willie Bailey vs. Roy L. Vining* case which was tried here before this Court in the Middle District of Georgia?

A Yes, I did.

Q And can you tell, just for the record, what the nature of that case was, Mr. Coates?

A Yes sir. Initially when the case was filed, it involved claims against the at large voting procedures for the Eatonton City Council and the Board of Commissioners and the Board of Education for Putnam County. During the course of the litigation, the case also came to include challenges to the Grand and Traverse Jury selection process in Putnam County.

Q In preparation for this trial, did you have occasion to go to the Putnam County Clerk's Office to investigate?

A Yes, I did on numerous occasions. I particularly spent a great deal of time in Putnam County and at the Courthouse in the Summer of 1978. As I recall, the *Bailey v. Vining* trial took place in August so during

the Summer of '78, I would have spent a great deal of time there.

Q How did you proceed with the course of your investigation when you were looking at—what were you looking for

* * * *

case is concerned with the Putnam County juries?

A The case of—the *Kirksey* case, which is one that I recall, which was an en banc opinion of the United States Court of Appeals for the Fifth Circuit was out at that time and I remember *Kirksey*, specifically noting that a history of race discrimination in the selection of jurors would be one piece of evidence that a court could take under consideration in making a finding in a vote dilution case so what I did is go—I went to the Clerk's Office and asked Mr. Dennis, who's the Clerk of Court in Putnam County, to provide me with as many jury lists as he could and when I say, "jury lists," I mean the Master List for both the Grand and the Traverse Jury. What I was interested in doing is looking historically at whether or not blacks had been underrepresented in Putnam County on the Jury List and then if I found such evidence, I would use that evidence in the *Bailey v. Vining* case as a piece of historical race discrimination evidence. And Mr. Dennis made those documents available and I perused them. My recollection is that my survey extended from sometime in the late 1940's or the 1950's up until the present, then being 1978.

Q In addition to this record search, Mr. Coates, did you make any kind of personal interview investigation, for instance, of other lawyers, who had filed challenges and so forth?

A Yes. In preparation for the case, I also perused for about a twenty-year period of the *Eatonton Messenger*, I think it is, which is the local newspaper there, and I came across an article that indicated that two

local attorneys, George Lawrence, Jr. or Chip Lawrence and Jesse Copeland had filed jury challenges in Putnam County and so I couldn't interview Jesse because he was representing the Putnam County Commissioners but I did go and interview Chip Lawrence and found out the details of the challenge that Mr. Lawrence had made to the juries in 1977.

Q Getting back to your record search, Mr. Coates, during the Summer of 1978, did you discover anything that—

THE COURT: Just a minute. In point of time, the challenge that George Lawrence, the former District Attorney, had filed in '77 actually preceded the recomposition of the Box prior prior to the *Amadeo* case, didn't it?

WITNESS COATES: Yes sir.

THE COURT: Is that right?

WITNESS COATES: Yes sir. Mr. Lawrence is—well, I do not know the answer to that question, Your Honor. Mr. Lawrence's challenge was some time prior to my study of the list which took place in the Summer of 1978.

THE COURT: But you don't know whether it preceded the *Amadeo* case?

WITNESS COATES: No sir.

THE COURT: Do either of you know?

MR. WARNER: No, I do not, Your Honor.

THE COURT: Mr. Coates, do you know whether or not this challenge was successful?

WITNESS COATES: My recollection, Your Honor, was that the Judge denied the challenge on race grounds but he ruled—but he allowed the challenge on sex grounds and he may have allowed the challenge on age grounds. That's my recollection but I have not read a transcript; it would only come from my recollection of the newspaper article.

Q MR. WARNER: Mr. Coates, I'll show you what's been marked as Petitioner's Exhibit No. 4 and ask you if you can identify that.

A Yes, I can. This is a photostatic copy of a memorandum that I found during the time that I was making my study of the Master or Grand and Traverse Jury Lists in Putnam County.

Q Where specifically, as specifically as you can recall because it's been a long time, where specifically did you find that? Was it a part of the public record?

A Well, my recollection is that there was probably a book in Putnam County that contained the Master List. There may have been lists that were in looseleaf form as opposed to a book but Mr. Dennis gave me those materials and I just don't—I don't recall whether or not it was a book or whether it was looseleaf pages but I do remember that this memorandum, I found this memorandum in those materials. It was—I do—I recall that it was not on the first page of the book and it was not on the first page of the materials that I was perusing but somewhere within the stack of materials that Mr. Dennis gave me, this document appeared.

Q Because of your broad range—well, let me rephrase that. You were not challenging a particular jury array in a criminal case in doing the case in the *Willie Bailey* case, were you?

A No sir. My purpose was not to find out whether the—my exclusive purpose or my sole purpose was not to find out whether or not the present Jury Lists in Putnam County in 1978 were unconstitutional in making my survey even though that was one of the purposes; it wasn't my exclusive purpose.

Q Would it be fair to say then that you had a broader purpose in mind?

A Right. My broader purpose was to survey all the jury materials for a twenty to thirty-year period and pick from those materials pieces of evidence that would

show as a historical matter that blacks had consistently been underrepresented in Putnam County.

Q Would it have had as much—would that memo have had as much significance for you if you had been conducting a search on a particular criminal case without the broad ranging search that you were doing?

A I think the memo would have had—from the way that I read the memo, it would have had the same impact on me whether or not I would've been doing the broad historical search or whether or not I had been doing a search for a specific jury challenge.

Q Now, after you took a look at this particular piece of documentary evidence, did you follow that up by interviewing anyone?

A Yes. Since I was in his office and since I knew that he was the Secretary to the Jury Commissioners, I went to Mr. Dennis and asked him if he was familiar with the memo and he indicated to me that he was and he indicated to me that the memo had come from the District Attorney's Office and that it was instructions to the Jury Commissioners in Putnam County about what to do concerning the Master Grand and Traverse Jury Lists. I do not remember if Mr. Dennis said at that time that the memo had been sent because of Mr. Lawrence's challenge but I inferred, knowing the circumstances, that that probably occurred.

Q Did you continue with your investigation after talking to Mr. Dennis insofar as the jury lists were concerned? In other words, did you look at the lists after this memo had been circulated?

A I looked at all the lists that he made available to me and those lists were from the one being used in 1978 until sometime back in the 1950's and I extracted from that material pieces of information that we offered at the trial.

Q Now, looking back at the people that you interviewed insofar as the jury challenges were concerned, Mr. Copeland and Mr. Lawrence, did your investigation

reveal that there was an increase in the number of blacks in juries on the panels after the challenges were made?

A Well, I think that this memorandum shows that there was an increase. I was familiar with the line of cases after *Swain vs. Alabama* that held that if the disparity between the percentage of blacks in the jurisdiction and the percentage of blacks on the lists was less than 10% that the statistical showing of old did not make out a prima facie case of discrimination. There was some cases to that effect at that time and when I saw this memorandum or the reason I went to Mr. Dennis was, what quickly came to my mind, is that this is a memo where someone has told the Jury Commissioners in Putnam County how to try to remedy the challenge to their juries, add some blacks and some women, continue to underrepresent significantly those groups while at the same time arguably coming within the *Swain v. Alabama* case; that is to say, for example, this memo shows that blacks would constitute 37% of the list on the Traverse List after the additions were made and that raised a red flag to me because I said this is still underrepresenting blacks; they're 48% of the general population according to the 1970 census. In Putnam County, they're 42% of the age eligible population and this memo is saying, add enough blacks so that you come out with 37%. Arguably, that comes with the *Swain vs. Alabama* rule but it also, to me, indicated an intent to continue to underrepresent blacks, so being somewhat familiar with the case law in the area, somewhat familiar with Mr. Lawrence's challenge and then when I saw this memorandum, it was a red flag and that's why I went to Mr. Dennis.

Q Would it be fair to say that you put it all together and made that presentation to the Court in *Willie Bailey*?

A Yes. The theories that I just articulated are the theories that I presented to Judge Owens at the time of the trial.

Q Now, after this period, after this trial was over with on August 17th, 1978, did you ever have occasion to become familiar in an indirect way with the Petitioner's case through Mr. Roy Lambert?

A I knew that—well, *Bailey v. Vining* was filed in December of 1976 and I was in and out of Putnam County in 1977. I knew that there was a bad murder case that went on over there and—but I did not know the Petitioner or I did not remember his name. After the trial in *Bailey v. Vining*, I had an occasion to have a conversation with a woman by the name of Patsy Morris. At that time I was employed by the Southern Regional Office of the ACLU and Patsy works for the Georgia ACLU but the offices are close by and I saw her on a fairly frequent occasion and I was telling her about the *Bailey v. Vining* trial and about the evidence concerning the juries and she was familiar with this case. She works as a death penalty monitor for the ACLU and so she said, 'Do you know Roy Lambert?' And I said, 'Yes, I know him. I had a case with Roy, he represented the City of Madison in a voting case I was involved with' and so she said, 'Well, be sure and let Roy know what came out in *Bailey v. Vining* because he was involved in a death penalty case that arose in that jurisdiction.' So, I cannot remember when I called but I did have occasion to call Mr. Lambert and tell him what had come out in the *Bailey v. Vining* case.

Q You did tell him? What was his—what did he say to you?

A My recollection of what Mr. Lambert said was—I told him about what we had found and what Judge Owens had done and he said, 'Well, we did not know that in the death penalty case and that we had a hard case and that I wish that we had known it because we were looking for every issue to raise because it was a serious case.'

MR. WARNER: Thank you, Mr. Coates. He's with you, Ms. Boleyn.

CROSS EXAMINATION

BY MS. BOLEYN:

Q Mr. Coates, in making your investigation in the Clerk's Office at Putnam County, other than Mr. Lawrence's challenge to the Putnam County Grand Jury, did you find any other time that the jury had been challenged either successfully or unsuccessfully in Putnam County?

A Besides Mr. Copeland's challenge and Mr. Lawrence's challenge?

THE COURT: Is that one time or two?

WITNESS COATES: My best recollection about that was Jesse Copeland and Chip Lawrence were co-counsel in the case or Chip Lawrence filed his challenge and then Jesse filed his during the same term of Court.

Q MS. BOLEYN: I understood you to say, Mr. Coates, did I not, that you were trying to take an overview from somewhere around 1950's up through '78 insofar as you were in that year?

A Yes ma'am.

Q And the only ones that you're aware of is the one that Mr. Wallace and Mr. Copeland participated in, and Mr. Lawrence?

A Yet me think about that for a moment. Tom Jackson, who is an attorney here in Macon, may have filed a challenge to the juries in Putnam County prior to 1977. He had been involved in some civil rights litigation in Putnam County and it seems to me that that may have involved a jury challenge as well but I'm just not sure about that.

Q Do I understand you correctly, Mr. Coates, that what motivated you to begin your investigation for purposes of what became the *Bailey v. Vining* case was decisions coming out of the United States Supreme Court in the then Fifth Circuit?

A Yes. The vote dilution cases that said that there was an aspect of the racial history of the county that the Court could consider.

Q I guess what I'm asking, Mr. Coates, is did you go into Putnam County with the idea that you were going to find unconstitutionally selected juries or were you simply looking to see if there were any facts that would support the legal conclusions that had been made in other similar cases?

A My experience tells me that if you go back far enough in every county in Georgia, you will find the underrepresentation or exclusion of blacks from the juries, so when I started looking at the lists in Putnam County, it is correct to say that I felt that if I looked back far enough that I would find race discrimination.

Q You thought you were going to find an historical pattern of underrepresentation of blacks?

A That's correct.

Q And you weren't specifically interested—

THE COURT: Ms. Boleyn, it seems to me it would be fair to point out that in the *Bailey v. Vining* case, the focus of the case was upon the electoral process in both the City and the County and my best recollection is that the jury composition came along as an afterthought after that memo came to light. Would that be fair, Mr. Coates?

WITNESS COATES: Yes sir. At the time that the trial commenced in *Bailey v. Vining*, the Jury Commissioners were not party defendants and my recollection of what happened was that after the testimony came out concerning the memo and how the juries had been selected—how the jury was being selected, that you made the statement when Mr. Dennis was sitting where I'm sitting now, that—words to the effect that you felt that that was an entirely unconstitutional procedure and after you made that statement, then I moved that the Jury Commissioners be added as party defendants and you allowed the amendment.

THE COURT: I think the transcript so says.

Q MS. BOLEYN: So then what you really—you didn't go into attempting to attack jury selection procedures, you just happened to find that in looking for an

historical pattern of discrimination concerning voting rights, is that fair?

A That's correct, that the main thrust of the *Bailey v. Vining* litigation was an attack upon the at large voting procedures so after I found this memo and after I got, for example, how blacks were being represented in 1958 and 1964 and 1970, then I stopped because that's all that I thought that I needed to do to make that one point and then in preparation since it was a voting case rather than a jury case, I went on to the paving in the appointments and the other areas that the Court looks at in challenges to at large voting.

Q During your investigation, did you simply go to Mr. Dennis' office and ask him to look at those Master Lists and he immediately complied or did you have any difficulty in investigating the allegations that you were pursuing? Did you have to subpoena the records?

A No. My—I can't remember whether I got the lists immediately when I asked but it would've been within a reasonable period of time and it would be fair to say that Mr. Dennis was cooperative. He made the public records available to me.

Q Did Mr. Dennis in any way point you to this memo or did you just happen to find it looking through the bound and looseleaf pages in the Clerk's Office?

THE COURT: Hand me the memo, Mr. Coates. Has this been marked as an exhibit?

MR. WARNER: Yes sir, Your Honor, I believe that's No. 4.

THE COURT: Okay. Go ahead.

A WITNESS: No, Mr. Dennis did not point the memo—point me to the memo and either looking through it, whatever the Master Lists were in, whether they were loose pages or a book, within the book or the loose pages, I found the memo. It wasn't on top. I found it because I was going through all the materials.

Q MS. BOLEYN: And then you subsequently confronted Mr. Dennis and he confirmed with you that it was?

A Yes ma'am.

Q When you talked to Roy Lambert, did you give him a copy or send him a copy of the memo, if you recall?

A No, I do not recall sending Roy a copy of the memo. I think that I, at one time, gave Nelson Jernigan a copy but that would've been after I talked with Mr. Lambert.

Q Did you make available to Mr. Lambert any part of the hearing transcript or the evidence in *Bailey v. Vining* with respect to the jury?

A No, I do not remember doing that though I may have done that regarding Nelson Jernigan.

Q Did you have any reason at any time in your investigation for the broader purposes that we've discussed, did you have any reason to focus on the 1977 Jury Lists as opposed to any other lists, other than the memo?

A Well, yes in this regard. I think that I assumed in offering—I assume in offering evidence on jury discrimination in a voting case that the judges, who all Georgia lawyers know that if you go far enough back that you're going to be able to show an underrepresentation in any county that has a black—a substantial black population and so what would've been going through my mind was showing what the situation was in '77 or '78 would have had more of an impact on the Court than what took place in 1958, so to that extent, I was interested in getting the present materials and I was also interested in getting the present materials because I, in my conversations with Mr. Lawrence and my reading the local newspaper, I knew a challenge had been made.

Q What, if any, information did you receive in your investigation about dissemination of the memo that was in the pages that you found?

A That it came from someone in the District Attorney's Office and that it—the information—the memo was given to the Jury Commissioners.

Q And did you have any information that the memo was given to anyone other than the Clerk who was the Secretary to the Jury Commissioners or the Commissioners themselves?

A No.

Q I guess I want to ask you, do you know whether any lawyers in the county were familiar with that memo at that time?

A Well, someone in the District Attorney's Office was familiar.

Q Correct; other than that? I was just—my question goes to whether you have any information about it had been disseminated to the public at large as opposed to the Jury Commissioners?

A No, and the information that I got would indicate just the contrary. In talking with Mr. Lawrence, I told him about the memo and because I thought the memo was in response to his challenge and he seemed surprised. It did not appear to me that Lawrence, the one lawyer in the County, knew that the District Attorney had actually gotten involved in telling the Jury Commissioners how many blacks to put on the lists.

Q In your conversation with Mr. Lambert, did he indicate that he knew of the existence of the memo prior to your conversation with him?

A No. My recollection on that is absolutely clear and that is that Mr. Lambert indicated that he did not know of the memo and he did not know of any actions involving the District Attorney telling the Jury Commissioners how many blacks to put on the lists.

Q Did you ever talk with William A. Prior about the *Amadeo* case or the jury selection issue?

A No, I did not. I know Judge Prior because he represented the Morgan County Board of Commissioners and I was involved in a voting case with them and we were talking during this period of time because of the voting case; it was *Butler v. Underwood* was still going

on but I do not ever remember talking with Billy Prior about this case.

Q About *Amadeo* or about the memo in connection with anything else?

A Yes.

MS. BOLEYN: No further questions, Your Honor.

THE COURT: Anything else?

MR. WARNER: I don't have any further.

TESTIMONY OF C. NELSON JERNIGAN

[Transcript of November 15, 1985 Hearing at 54-62]

BY MR. WARNER:

Q Would you state your name and address for the record, please sir?

A Nelson Jernigan.

Q Mr. Jernigan, where do you reside?

A 535 Pinetree Drive, Atlanta.

Q What occupation are you engaged in?

A Lawyer.

Q And do you practice in the City of Atlanta?

A Yes. I have an office in Peachtree Center, South Tower.

Q How long have you been licensed to practice law in the State of Georgia?

A It'll be nine years this year, this month.

Q Now, in regard to Mr. Tony B. Amadeo's Appellate Court action, were you ever contacted by Mr. Roy Lambert about this?

A Yes.

Q Can you tell the Court how that occurred, please?

A It was in January or February, I believe in 1979, I was in the Legislature for five years so I think it was '79 or maybe it was '78, and I spent a lot of time with Roy Lambert and other people in the Legislature in promoting the, what we were trying to put together, the Georgia Indigent Defense Counsel or the Georgia Indigent Defense Bill, so I was pretty regularly around Mr. Lambert. And I was up at, I believe, at the Mariott on many occasions at meetings at nights with various administration leader people for Governor Busbee talking about this bill and that's where he—we started talking about these kind of cases and he said, 'Will you help me on this case?'

Q Did he ask you to make any kind of investigation with regard to the jury issue?

A I believe—my best recollection is he didn't specifically say that; he just gave me the file or a portion of the file and said, you know, 'Go to work on this and see what you can find.'

Q And what did you do?

A Well, of course, I read what I had of the record and I called people that had tried cases in that area and called, I don't remember exactly who, but various people that had tried cases down there against Joe Briley because I knew who the prosecutor was and knew of him. And I wound up finding Chris Coates and talking to him, who at that time was working on a case, I don't remember the name of it, but it was a civil rights voter kind of case, and I talked to Chris about this and I said, 'I understand you've been working in Putnam County' and I said, 'I'm researching, you know, various issues that may be used in the appeal of this case to the Court of Appeals.' And he said, 'Well, I think I have something you'd be interested in.' We met in person; we went over either a copy of or the, what was called the note that later I think was found to be handwritten by the District Attorney out there, Joe Briley. And I thought about that for a few days and so in answer to your question, I'm trying to elucidate it slightly but I don't think he specifically directed me to that, but I found it pretty soon after he put me on the job.

Q And you say, Mr. Jernigan, that this probably in January of '79, is that correct?

A Yes, be January or February because the Legislature was in session then. Roy, of course, was busy with the Legislature. He was House Administration Leader and had been at that point like twenty-six years so, you know, he was pretty covered up which I think is probably one of the reasons he asked me to help.

Q Did you make any findings and draw any conclusions and make any findings that you reported to Mr. Lambert?

A Well, yes. When I found this jury issue, you know, I can remember where I was and it was like "Eureka," you know, because I thought this was a good issue in the case; I mean, good for Mr. Amadeo because I had worked for Superior Court judges and I had specifically researched that issue of the relationship of court officials to Jury Commissioners because at one time, a Superior Court judge wanted to delegate that process to me back when I was a court administrator and I had researched it and I said, 'I don't think you can do that. I think it's the Code and the historical development of the law requires that only the Superior Court judge be instructing and answering questions from the Jury Commissioners.' And so when I saw that a person who was a lawyer who had an interest in cases that would be tried by the jurors had directly communicated to the Grand Jury—to the Jury Commissioners, I thought that that was an impropriety of some significance. But setting that aside, what was in the note was, you know, clear to me that it was a scheme to intentionally discriminate in the selection process of the jury but still try to get the figures to come up to meet the standards which I think back in those days, was the case of *Whitus* and *Swain* come back to me; I haven't read any of the file or anything so I'm a little fuzzy on that. That's what I remember about the cases and I said, 'This is a great issue because there's intentional discrimination by instructing the Jury Commissioners from someone who has an interest, an advocate, who's going to appear before these jurors; in other words, he's stacking the jury.' And also the intentional discrimination was evident by him pulling the numbers down to the minimum. In other words, he was trying to hit, as I recall and I have not read any of the case since 1979, that the numbers were pretty close to the standards to make out a prima facie case of discrimination. So, I went back and talked to Roy about this issue and he said, 'Yeah, we didn't think there was anything wrong with the Box. That issue had occurred to us but

we didn't think there was anything wrong with the Box.' And it looked like what the information we got, and I do not remember how they went about it, but they said the information, that it appeared to us it was okay. I said, 'Well, there was no way by looking at the numbers that it would alert, you know, a lawyer to look further into it.' They looked okay. I said, 'All of this was secret and hidden.' So, without a, you know, fairly massive, and at that point, unjustified, evidentiary hearing and being able to divine that this process had gone on or something like that, it could've, you know, wouldn't have been reasonable to expect anybody to do it.

Q Did he indicate to you a willingness to assert that issue?

A Oh, he thought it was great, yeah. He was writing the Brief.

Q What did he say about his prior knowledge of it and what he would've done?

A Well, I can't say specifically—I don't think he told me what he would have done; I think he just said that it was a great issue, I wish I'd known it.

Q Did he say anything to you in regard to—well, he did say something to you in regard to not knowing this issue prior to trial, is that correct?

A If I understand what you're trying to ask me, did he say that he didn't know about the issue?

Q Prior to trial, prior to the trial of the case?

A No, he didn't know about this issue prior to trial.

Q And he expressed a willingness to urge this issue. Did he tell you anything about the fact that he was raising this at the earliest possible time that he knew about it?

A Well, the earliest possible time was then and he said, 'Yeah, it's a, you know, he—' I wrote the Brief and I don't know, I haven't seen the finished copy, I don't know what was taken out or put in, I didn't—I was just functioning as a law clerk, I guess, or as a favor to Roy, Mr. Lambert. And I took the Brief back to him and we

sat in the hotel room up in the Mariott in Atlanta and he read it aloud, read the whole Brief aloud cause that's a habit of his to do that, and, you know, he said, 'This is a great issue. I want you to help me prepare for the oral argument because I've got to do all this by myself.' So, apparently, I didn't know who else was involved in the case. I saw Judge Prior this morning so obviously he was the other lawyer, but I didn't—all my contacts were with Roy and he had the responsibility for doing it all, from my—as far as I knew.

MR. WARNER: He's with you, Ms. Boleyn.

CROSS EXAMINATION

BY MS. BOLEYN:

Q Did you know, Mr. Jernigan, at the time that Mr. Lambert approached you about helping him, at what stage the proceedings against Mr. Amadeo were at that time?

A I understood it to be the direct appeal from a trial court to the Georgia Supreme Court from trial.

Q Do you know whether or not the Motion for New Trial had already been conducted or not, do you recall?

A I do not recall; I'm sure—if it was in the file, I read it; if it wasn't in the file, I, you know—it's been seven years so.

Q Did you do any investigation after you talked with Mr. Coates about whether there had been any other successful or unsuccessful jury challenges in Putnam County?

A No.

Q Did you know—the first you knew about this memo was your discussion with Mr. Coates that you've already described?

A I had heard about that. I'd heard about it, and I tracked down to—I didn't know Chris Coates before this jury, no; I heard—I don't know, heard it on the grapevine, I guess, legally from other lawyers that there's

something going on in Putnam County, and then I found Chris Coates in a day or two and it was the first time I met him and we went over the case.

Q Was what you heard that it had been established in a proceeding or was it the rumor was that the memo had been implemented? I mean, it had to have been—

A All I remember was the note and I don't remember anything about where any court proceeding might have been at that time. All I knew was about the note and I knew that it was, you know, indicated a real problem with the Grand Jury, selection of the Grand Jury, and that's what I acted on.

Q And you said that you'd never spoke with Judge Prior about Mr. Amadeo's appeal?

A I may have; I cannot, you know, on my oath, say that I did not but I do not recall any specific instruction. There were other people in the room but it was Roy who seemed to have the primary responsibility and the decision-making.

Q Did you ever get a copy of the note?

A Of the what?

Q Did you ever get a copy of the note or the memo?

A I don't remember.

Q Do you remember giving a copy of it to Mr. Lambert? Did he have a copy?

A I don't know; I don't recall whether he had one in his possession or not.

MS. BOLEYN: No further questions, Your Honor.

THE COURT: Anything else, Mr. Warner?

MR. WARNER: Just one further question.

REDIRECT EXAMINATION

BY MR. WARNER:

Q Mr. Jernigan, do you recall Mr. Lambert ever saying to you, 'If I'd known about this jury issue prior to trial, I would've raised it.'

A Yeah, I recall that. He said, 'It'd been a great issue if I'd known about it.'

MS. BOLEYN: He may be excused.

MR. WARNER: You may be excused. Thank you for coming.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

(Title Omitted in Printing)

PETITIONER'S MOTION FOR A CHANGE OF VENUE

Introduced into Evidence, *Amadeo* v. *Kemp*,
Civ. A. No. 84-76-1-MAC (M.D.Ga.)

[Transcript of November 15, 1985 Hearing at 63]

The motion of TONY S. AMADEO, WILLIAM S. CONLOGUE and DAVID L. COULTER, show the following facts:

1.

That they have been indicted in the Superior Court of said County for murder, in that it is alleged that they did on the 29th day of September, 1977, kill James D. Turk, Sr.

2.

Movants are now detained in the common jail of Putnam County, Georgia.

3.

Movants show that on account of the excitement and common and inflammed state of public opinion that has existed since the homicide, which was calculated to poison the minds of the jurors of said County, and further, a large portion of the jurors have formed an opinion as to the Movants' guilt or have become prejudiced or biased against them, either from having heard the testimony at the committal hearing or from having heard statements of others and from certain evil disposed persons, relatives and friends of the deceased, who circulated rumors ex-

ceedingly damaging to the Movants and prejudicial to a correct determination of the issues involved in this case, and that the public mind has been so poisoned and prejudiced by exaggerated rumors in the newspapers and local press that Movants will be unable to get a fair trial by an impartial jury in said County, this sort of trial that they are entitled to under the laws of the land, the State of Georgia, and the United States. There is also danger of violence being attempted to be committed on the accused.

WHEREFORE, Movants, insisting upon their innocence, move this Court to change the venue in said case, and that they be ordered tried under said indictments in some other County in the Circuit and in the State of Georgia other than the County aforesaid.

/s/ E.R. Lambert

/s/ William A. Prior, Jr.
Movants' Attorneys

PETITIONER'S MOTION FOR A CONTINUANCE

Amadeo v. *State*, 243 Ga. 627, 255 S.E.2d 718 (1979),
Introduced into Evidence, *Amadeo* v. *Kemp*,
Civ. A. No. 84-76-1-MAC (M.D. Ga.)

[Transcript of November 15, 1985 Hearing at 63]

[Style and Certification Omitted]

Now comes the hereinabove named Defendants and move the Court for a continuance of the trial of the above shown cases based on the affidavits of counsel for said Defendants attached hereto and made a part of this Motion.

/s/ E.R. Lambert

/s/ William A. Prior, Jr.
Attorneys for Movants

AFFIDAVIT IN SUPPORT OF MOTION FOR CONTINUANCE

GEORGIA, PUTNAM COUNTY:

We, William A. Prior, Jr., and E. R. Lambert, both being duly sworn, depose and state on oath the following:

1. We are appointed attorneys for the accused in the above entitled case.

2. This Affidavit is in support of accused' motion for an order to continue the trial of the case until the third week in March, 1978.

3. Appointed counsel have used all due diligent in preparing the case for trial, but because of certain circumstances, that is, Defendants have been lodged in the

Putnam County jail and counsel for Defendants reside and practice law in Madison, Morgan County, Georgia, and because of the inconvenience of travel and time limitations, appointed counsel have been unable to confer with Defendants and because of inconvenience and of a place to interview Defendants, because one Defendant is a resident of the State of Maine, one Defendant is a resident of the State of Minnesota and one Defendant is a resident of the State of Texas, counsel for Defendants have been unable to contact and interview the families of said Defendants, said Defendants are presently members of the United States Marine Corps stationed in Jacksonville, North Carolina, and because of the distance to Jacksonville, North Carolina, counsel for Defendants have been unable to confer with the military superior officers of said Defendants, counsel for Defendants have requested that the Defendants be examined by a qualified psychiatrist at Central State Hospital and although the examination has been conducted, the counsel for Defendants have not received the report from this examination and do not know the results thereof and are therefore unable to form an opinion as to the sanity of said Defendants prior to arraignment, counsel of Defendants have not been furnished with a list of witnesses including the arresting officer of Defendant Coulter and Defendant Conlogue in McDuffie County, Georgia, arresting officer of Defendant Amadeo nor military personnel in Ft. Gordon, Georgia, where Defendant Amadeo was incarcerated for a short period of time, as well as other witnesses whose testimony may be material to the outcome of this case and counsel, through no fault of their own or that of Defendants, do not have reasonable time to try the case for trial, and unless a continuance is granted, the accused will be deprived of a fair trial.

4. The case should not be allowed to proceed to trial before the third week in March, 1978, on account of the

passions and prejudice engendered against the Defendants by the public communications media.

5. Newspapers and radio have since September 29, 1977, reported prominently the stories. These stories and radio accounts have engendered popular excitement and prejudice against Defendants in such a manner that it is impossible for them to obtain a fair trial at this time.

6. Affiants believe that the passage of time will allow passions, excitement and prejudice to subside and that the Defendants will have a better chance for a fair trial if the trial is continued until the third week in March, 1978.

7. We swear that the contents of the above and foregoing to be true and correct to the best of our knowledge. So help me God.

/s/ William A. Prior, Jr.
WILLIAM A. PRIOR, JR.

/s/ E.R. Lambert
E.R. LAMBERT

SUPREME COURT OF GEORGIA

TONY B. AMADEO

v.

GEORGIA

May 2, 1979

NICHOLS, Chief Justice.

Tony B. Amadeo appeals his conviction for the murder of James D. Turk, Sr., and the sentence of death imposed upon him for this offense. He also appeals his conviction for the offense of criminal attempt to commit theft. This court affirms.

This is a companion case to *Conlogue v. State*, 243 Ga. 141 (253 SE2d 168) (1979).

1. The admission in evidence of his statement is enumerated by Amadeo as error, based upon a contention that the statement was not made voluntarily in that it was induced by hope of benefit. Code Ann. § 38-411. This court must accept the factual and credibility determinations of the trial court made after the Jackson-Denno hearing unless those determinations are clearly erroneous. *Johnson v. State*, 233 Ga. 58 (209 SE2d 629) (1974); *Pierce v. State*, 235 Ga. 237, 239 (219 SE2d 158) (1975).

During the Jackson-Denno hearing, Amadeo testified that one or perhaps both of the GBI agents who questioned him told him if he would give a statement, he or she would talk with the district attorney and Amadeo probably would get a lighter sentence. Amadeo was not positive in his testimony as to whether it was the male

agent, or the female agent, or perhaps both, who made this offer, but he believed it was the female agent. The female agent testified with some equivocation both that she did not make any such statement and that she could not recall having made any such statement; and that she thought she had not done so. Each of the agents was out of the room during parts of the questioning. The issue made in this court by the parties relates alone to what the female agent either did or did not say. This court agrees with the trial court that these circumstances presented to the trial court a close question of whether or not Amadeo's statement was induced by hope of benefit. However, after careful consideration of the total circumstances, including Amadeo's own inconclusive testimony as to who made the alleged offer of benefit, this court concludes that the decision of the trial court to admit the statement was not clearly erroneous. The first enumeration of error is without merit.

2. Amadeo next complains of the admission of evidence of his participation with David L. Coulter and William S. Conlogue in a robbery-murder in Alabama. The three were absent without leave from the United States Marine Corps Base at Camp LeJeune, North Carolina. They had been traveling together in Amadeo's automobile through Tennessee, Alabama and Georgia. The Alabama offenses were committed on September 28, 1977, and the Georgia offenses occurred at approximately 8:30 a.m. on September 29, 1977.

There was evidence from which the jury could have determined that the same three persons, using the same firearm and escaping in the same motor vehicle, had perpetrated the offenses in Alabama and in Georgia for the same reason—that is, to obtain money with which to continue their travels. The conditions of admissibility as set forth in *French v. State*, 237 Ga. 620 (229 SE2d 410) (1976), are satisfied. The trial court charged the jury as to the limited purpose for which these similar crimes

were being admitted—that is, to illustrate Amadeo's intent or state of mind—a purpose for which our decisions recognize an exception to the general rule against admissibility of evidence of other criminal activity. Code Ann. § 38-202. *Clemson v. State*, 239 Ga. 357, 360-361 (236 SE2d 663) (1977); *Thomas v. State*, 239 Ga. 734, 736 (238 SE2d 888) (1977); *Booker v. State*, 242 Ga. 773 (251 SE2d 518) (1979); *Burgess v. State*, 242 Ga. 889 (252 SE2d 391) (1979). The second enumeration of error is without merit.

3. Amadeo next urges that it was error for the trial court to charge Code Ann. § 26-1902, pertaining to armed robbery, because the indictment only charged criminal attempt under Code Ann. § 26-1001. The charge taken as a whole could not have harmed Amadeo. *Hilton v. State*, 233 Ga. 11 (2) (209 SE2d 606) (1974). The trial court explained this portion of the charge to the jury as follows: "Now let me say that he is not charged with the offense of armed robbery. He is only charged with the offense of criminal attempt and I only give you this pertinent portion of the code section which I have just cited in order to clarify to you the wording of count two in the indictment." The third enumeration of error is without merit.

4. Amadeo's fourth enumeration of error relating to jury composition is without merit as his challenge comes too late. *Goodwin v. Hopper*, 243 Ga. 193 (253 SE2d 156) (1979); *Harris v. Hopper*, 243 Ga. 244 (1979; *Holton v. State*, 243 Ga. 312 (1979). The case of *Barrow v. State*, 239 Ga. 162 (1) (236 SE2d 257) (1977), is to be distinguished from the present case in that Barrow's conviction and sentence had been set aside on appeal, after which he filed and pursued timely challenges to the arrays then brought his case back to this court by interlocutory appeal after denial of his challenges but *prior to trial and conviction*. Barrow did not take his chances with unchallenged grand and traverse juries then attempt

to challenge the arrays after conviction, this being the trial tactic that is precluded by such decisions as Francis v. Henderson, 425 U.S. 536 (96 SC 1708, 48 LE2d 149) (1976) and *Goodwin v. Hopper*, supra. The fourth enumeration of error is without merit.

5. Amadeo's fifth enumeration of error contends that the trial court erred in overruling his motion for new trial for the reasons stated in his previous enumerations of error. This enumeration of error is without merit for the reasons previously stated in this opinion.

Sentence Review

To authorize affirmance, the death sentence imposed in this case must conform to the standards set forth in Code Ann. § 27-2534.1. Those standards require this court to determine whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; whether the evidence supports the jury's findings of statutory aggravating circumstances; and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, as required by Code Ann. § 27-2537(c) (1-3).

We have reviewed the trial transcript and record and have made a comparison of the evidence and sentence in similar cases pursuant to the mandate of the statute.

We conclude that the sentence of death imposed in this case was not imposed under the influence of passion, prejudice or any other arbitrary factor.

In recommending the death penalty, the jury found the following statutory aggravating circumstance: "That the offense of murder was committed while the offender was engaged in the commission of another capital offense, to wit: Armed Robbery." Code Ann. § 27-2534.1(b) (2).

The "while . . . engaged in the commission of" requirement of that subsection does not require that the subject

felony shall have been completed or that the offender shall have been charged with or convicted of the felony. In a pre-trial statement that was admitted into evidence, the appellant admitted that he and his two companions had been driving around, when they spotted a man in a brown pickup truck dumping trash into a dumpster. They turned around and came back, at which time the appellant got out of the back seat with his .22 automatic, walked up to the truck, and demanded money from the man. Appellant then shot the man. The man grabbed his chest, slid off the right side of the truck to the ground, and yelled for help. Appellant ran for the car and they departed. Amadeo was "engaged in the commission of another capital offense, to wit: Armed robbery" when he shot the victim. *Moore v. State*, 233 Ga. 864 (213 SE2d 829) (1975).

The evidence supports the jury's finding of a statutory aggravating circumstance, and the verdict is factually substantiated.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which death or life sentences were imposed. We find that the similar cases listed in the Appendix support the affirmance of the death penalty in this case. Tony B. Amadeo's sentence to death is not excessive nor disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Judgment affirmed. All the Justices concur.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

TONY B. AMADEO

v.

RALPH KEMP, Warden

May 17, 1984

OWENS, District Judge:

Congress, by law, has given every person imprisoned as a result of a state court conviction the right to file a petition in a United States district court alleging that his conviction was "in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2554. Congress has imposed a duty upon United States district judges to determine in each such case whether or not the Constitution or laws of the United States were violated. If so, such convictions must be overturned; if not, such convictions must remain undisturbed.

Petitioner Tony B. Amadeo, having been convicted in Putnam Superior Court of murder and attempted theft and sentenced to die, and having exhausted all state court remedies for attacking his conviction, *Amadeo* v. *State*, 243 Ga. 627, 255 S.E.2d 713, *cert. denied* 444 U.S. 974 (1979), petitioned this court alleging that his conviction resulted from eight constitutional errors and requests that his conviction and sentence be set aside. Respondent denied each and every allegation of error. The petitioner and respondent agreed that no evidentiary hearing is required and asked for this court's decision on each issue. Since two of said issues each require that petitioner's

conviction and sentence be set aside, the remainder of said issues will not be considered.

I. *Admission of "Other Crimes" Evidence*

Petitioner was indicted for the murder of James D. Turk, Sr. The state alleged that petitioner killed Mr. Turk at approximately 8:30 a.m. on September 29, 1977, near Eatonton in Putnam County, Georgia. At trial, the prosecutor was prepared to present extensive evidence of petitioner's involvement in a robbery and murder committed in Colbert County, Alabama during the night preceding the murder of James Turk; petitioner had not been tried for either Alabama crime. The petitioner moved in limine to exclude the Alabama "other crimes" evidence, arguing that it was irrelevant, not probative of the offense for which he was being tried or any disputed issue, and that its prejudicial effect would deprive him of a constitutionally fair trial. *See* Ga. Code Ann. § 38-202; 38-415 (now codified at O.C.G.A. §§ 24-2-2; 24-9-20(b)); *cf.* Fed.R.Evid. 404. The trial court overruled petitioner's motion to exclude, finding the evidence to be probative of petitioner's identity as the perpetrator and of his motive. Tr. at 79-80. The Georgia Supreme Court affirmed on the theory that the evidence was probative of motive, *i.e.*, that the Alabama and Georgia homicides were committed for the same reason—to obtain money while petitioner was AWOL from the United States Marine Corps. *Amadeo*, 243 Ga. at 629, 255 S.E.2d at 720. In his brief before this court, respondent asserts yet another basis for admission: to rebut petitioner's "defense" of an accidental shooting.

In order to access petitioner's constitutional claim, it is necessary for this court to consider the nature and strength of the prosecution's evidence separate and apart from the evidence of the preceding Alabama incidents.

First, before the trial judge considered petitioner's motion to exclude evidence of the Alabama crimes, the

following written confession signed by petitioner was found to have been voluntarily given and to be admissible in evidence:

> Last night Gemini, Bill and I slept in my car, a 1977 Monte Carlo, in a roadside park somewhere on the other side of Atlanta. This morning, Thursday, 9/29/77, we drove around in Georgia on some back roads looking for a little store to hit. Bill was driving when we spotted an old white man in a brown pickup truck dumping trash in a dumpster. We passed by him and turned around to come back. When we got back, we turned around again and pulled up beside the truck. I got out of the back seat with a .22 automatic. I walked up to the truck and I asked him for his money. He said he didn't have none. I said yeah, you do. Then that truck [driven by Talmadge Holder], it had a white cab and steel sides, pulled up. The man was still in the back of the pickup. *Then I shot him. I shot one time.* The man grabbed his chest and kind of slid off the right side of the truck to the ground. He turned and yelled for help and started for that other truck. I just ran for our car. Gemini had got in the back seat so I got in the front. We took off.

Tr. at 255 (emphasis added).

Second, an eyewitness, Talmadge Holder, testified that as he pulled into the dumpster area, only two vehicles were present—the victim's pick-up truck and a white Monte Carlo, later identified as petitioner's automobile. Mr. Holder testified that he observed a short, white male standing along side the victim's truck. Mr. Holder waved at the victim (the two were prior acquaintances), and he then proceeded to leave the area by pulling onto the highway. Mr. Holder heard the victim screaming for help, yelling that he had been shot; he then observed the Monte Carlo leave the area. Mr. Holder positively identified petitioner as the man he had seen facing the victim and

the man who subsequently exited in the Monte Carlo. Tr. at 100.

Finally, the prosecution offered testimony from a state crime lab expert. The victim had been shot with a .22 caliber weapon. A spent .22 caliber shell casing was found in the bed of the victim's truck. The crime lab testified that if a semi-automatic firearm was used to kill Mr. Turk, this shell casing could have been ejected into the truck bed had the fatal shot been fired by one pointing the gun roughly parallel to the truck—a configuration consistent with Holder's description of the position of petitioner, Mr. Turk, and the pick-up truck. On the same day as the homicide the police seized a white Monte Carlo registered to petitioner and identified by Holder as the car he observed at the homicide scene. The police seized a .22 caliber semi-automatic handgun from this vehicle. The crime lab expert testified that firing pin and ejector markings on the spent casing found in the victim's truck positively matched the markings on a test round fired from this weapon. The identical nature of these markings led the expert to the opinion that the victim was killed by this gun. Tr. at 147-148.[1]

The petitioner presented no evidence in defense, Tr. at 240; instead he put the state to its customary burden of proving the charges beyond a reasonable doubt.

The prosecutor, stating that the Alabama evidence demonstrated that petitioner was on a "murderous rampage" (Tr. at A-264) and that he "enjoys killing" (Tr. at A-265), argued that the evidence was necessary for several purposes. An analysis of these reasons reveals that none justified admission of evidence of the preceding Alabama crimes.

First, the prosecutor argued that the Alabama evidence was necesasry to show the identity of petitioner

[1] The projectile recovered from the victim's body was too mutilated for comparison. The expert was able, however, to identify it as being of a .22 caliber.

as the perpetrator. The confession, eyewitness testimony, and ballistics evidence removed any doubt as to the identity of petitioner as the perpetrator. Petitioner's identity was never disputed by evidence upon his trial.

Second, the state argued that the Alabama evidence was necessary to prove motive or an intent to rob. Petitioner's own confession conceded that robbery was his motive and defense counsel in closing argument admitted petitioner intended to rob the victim. Tr. at A-262. Petitioner's motive was thus not a disputed issue.

Finally, the state argues that the Alabama evidence was necessary to refute petitioner's "defense." The state points out that petitioner's counsel in both opening and closing argument urged that the confession was involuntary and that the shooting was accidental. Therefore, the state argues, the Alabama evidence was necessary to corroborate the confession and to disprove an accidental shooting. The state overlooks the fact that defendant put up no evidence whatsoever in support of these claims. There was no evidence offered in support of the claim of accident, nor did the petitioner testify at trial as to the voluntariness of his confession. The arguments of counsel *were not evidence.* Petitioner's arguments had the legal effect of simply urging the jury to consider whether the state met its burden of proving its case beyond a reasonable doubt. The issue before the trial court was not whether the Alabama evidence was necessary to refute counsel's unfounded arguments. Instead, the trial court's sole inquiry should have been whether the state's case, apart from the Alabama crimes evidence, was sufficient to go to the jury on the elements of identity, motive, and intent. The admittedly prejudicial Alabama crimes evidence should have been admitted only if the state's case was absolutely void as to one of these necessary elements. The state possessed ample independent evidence as to each of these

elements. Therefore, the evidence of the Alabama crimes was clearly inadmissible.

Title 28 U.S.C. § 2254 is a statutory remedy for the correction of constitutional errors. Not all trial court errors are of constitutional dimension. Was this error in the admission of evidence of preceding Alabama crimes an error of constitutional dimension?

In order for an error on evidentiary matter such as this to warrant relief in this court on constitutional grounds, the error must have deprived the accused of the fundamental fairness that the Constitution assures all defendants. *Jameson* v. *Wainwright*, 719 F.2d 1125, 1126 (11th Cir. 1983). When fundamental fairness is lacking because of the improper receipt of "other crimes" evidence a showing of "gross or conspicuous" prejudice is satisfied. *Britton* v. *Rogers*, 631 F.2d 572, 575 (8th Cir. 1980).

This court concludes that the introduction of the Alabama evidence denied petitioner a fundamentally fair trial. This conclusion is based on two factors. First, the introduction of this evidence was totally unnecessary for the purposes advanced in support of admission. Given the strength of the state's evidence, this court is compelled to conclude that this case is evidence of sheer prosecutorial overkill. Second, regardless of whether this error could be found harmless as to the guilt-innocence phase, its potential for infecting the jury with unfair prejudice at the sentencing phase demands a re-trial of petitioner's case.[2]

[2] The court has not been advised as to whether there has been a final disposition of any criminal charges filed by Alabama authorities against this petitioner relative to the Alabama robbery and homicide. While evidence of such a conviction, if any, shall be inadmissible at the guilt-innocence phase of petitioner's retrial, the court expresses no opinion as to the admissibility of such evidence, if any, at a subsequent sentencing proceeding pursuant to O.C.G.A. § 17-10-30(b)(1).

II. *Jury Composition*

Petitioner was indicted by a Putnam County grand jury and convicted and sentenced to death by a Putnam County petit jury in 1977. In an unrelated civil action decided in 1978, this United States district court found that the jury selection procedures theretofore employed in Putnam County were intentionally designed to underrepresent black citizens in an unconstitutional manner. *Bailey* v. *Vining*, Civil Action No. 76-199-MAC (M.D. Ga. Aug. 16-17, 1978) (Evidentiary Hearing at 118-19).[3] Under prevailing law at the time of petitioner's

[3] [By Plaintiffs' Counsel] Q In 1977, after Judge Jackson ruled that the jury list needed to be reconstituted, did you receive a memorandum from the office of the solicitor?

A Yes.

Q I will show you what's been marked as Plaintiff's Exhibit A and ask if you could identify it?

A Yes Sir. . . .

* * * *

Q In reconstituting the jury list, Mr. Dennis; did the jury commissioners aim at the figures suggested there by the writer of this memorandum?

A Yes, they did. I turned that list over to the chairman of the jury commission.

Q With regards to grand jury, the writer of that memorandum suggested 101 black persons be put on the grand jury list?

A Yes.

Q And that was supposed to bring the percentage up to 31.4 percent?

A Correct.

Q With regards to—

THE COURT: Is this the way the present jury box is made up in your county?

THE WITNESS: Yes sir.

MR. COATES: Your Honor—

THE COURT: Y'all are wasting a lot of time over in that county trying anybody for a crime.

MR. COATES: Your Honor, that's the solicitor. We would suggest that the writer of that memo is telling the jury com-

trial, a 10% underrepresentation of minorities would not create a prima facie case of discrimination. *Swain* v. *Alabama*, 380 U.S. 202, 208-09, 85 S.Ct. 824, ——, 13 L.Ed.2d 759, 766 (1964). An underrepresentation of 15% or more could constitute a prima facie case. *Preston* v. *Mandeville*, 428 F.2d 1392, 1393-94 (5th Cir. 1970). In *Bailey*, this court found that the Putnam County Jury Commissioners intentionally selected a specific number of individually designated blacks so as to achieve an underrepresentation of approximately 11%—not enough to make out a prima facie case but underrepresentation nonetheless. Of course, such individual, subjective selections are also unconstitutional. *Cassell* v. *Texas*, 339 U.S. 282, 290 70 S.Ct. 629, ——, 94 L.Ed. 839, 849 (1950). Clearly, petitioner was indicted, tried and sentenced by unconstitutionally composed juries.

Petitioner's trial counsel did not raise a jury composition challenge at trial. After petitioner's conviction, but before his appeal became final, this court's decision in *Bailey* was released. Petitioner's counsel asserted a jury composition challenge for the first time on appeal, but the Georgia Supreme Court held this claim had been waived, pursuant to Ga. Code Ann. § 59-803 (now codified as O.C.G.A. § 15-12-162), as such claim must be asserted at trial. *Amadeo*, 243 Ga. at 629, 255 S.E.2d at 720.

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missioners how to under-represent blacks but avoid a prima facie case under Fifth Circuit case law.

THE COURT: Yes sir, looks like it.

* * * *

THE COURT: Well, there's no question in the Court's best judgment that the jury box as it now exists is unconstitutionally composed and cannot be further utilized for any purpose until it is completely reconstituted, both in accordance with the statutes of the State of Georgia and the decisions of the Supreme Court of the United States and of the other courts to the extent they may supplement and add to the decisions of the Supreme Court.

Bailey v. *Vining*, Civil Action No. 76-199 MAC (M.D. Ga. Aug. 15-17, 1978) (Evidentiary Hearing at 118-119; Order of August 17, 1978, at 7).

Petitioner seeks to assert the jury composition claim in this habeas corpus action. The respondent urges that this claim has been waived under a valid state procedural rule and cannot be asserted here absent a showing of "cause and prejudice" for the failure to assert this issue at trial. *Francis* v. *Henderson*, 425 U.S. 536, 542, 96 S.Ct. 1708, ——, 48 L.Ed.2d 149, 154 (1976).

As the Eleventh Circuit Court of Appeals has noted, "cause" under *Francis* v. *Henderson* has never been explicitly defined. *Smith* v. *Kemp*, 715 F.2d 1459, 1470 (11th Cir. 1983). The Supreme Court has indicated that the cause and prejudice test is designed to preclude argument of issues deliberately withheld at trial and first asserted in federal court—a tactic known as "sandbagging." *Wainwright* v. *Sykes*, 433 U.S. 72, 89-90, 97 S.Ct. 2497, 2507-08, 53 L.Ed.2d 594, 609 (1977). Where there has been no deliberate bypass, the state courts have been provided an opportunity to rule on the question prior to the filing of a federal action, and correction of the error is necessary to avoid a miscarriage of justice the cause and prejudice test is designed to preclude ar- F.2d at 1470.

Petitioner's failure to assert this issue at trial was not deliberate. Petitioner's counsel, looking at the statistics at the time of trial, was justified in assuming that an attack upon the jury would be futile. It was not until after trial, and after this court's decision in *Bailey*, that the inculpatory facts of how the Putnam County juries were composed came to light. Petitioner immediately asserted this claim on direct appeal to the Georgia Supreme Court, years before a federal action was first filed. That Court in its discretion declined to find sufficient cause under analogous state law to excuse the waiver. As a matter of constitutional law, this court is not bound by

that decision. This court continues to be appalled by the manner in which the Putnam County jury commissioners upon suggestion of the prosecuting attorney recompiled the grand and petit jury lists to underrepresent blacks and females. To overlook this act of intentional underrepresentation—and hand selection of those blacks who did serve—on the basis of a rule of procedure would indeed be a miscarriage of justice. Accordingly, this court finds that sufficient cause and prejudice exists to require this court also to grant the writ on the basis of an unconstitutionally composed grand and petit jury.

CONCLUSION

Either of these constitutional errors—admission of other crimes evidence or indictment and trial by grand and petit jurors selected from an unconstitutionally composed jury list—require that petitioner's conviction and sentence be vacated and that petitioner be reindicted and tried again for the murder of James D. Turk, Sr. It is therefore unnecessary to consider the remainder of petitioner's claims.[4] Accordingly, within 180 days from this decision becoming final because of expiration of time to appeal or the issuance of a mandate affirming this order, whichever is later, respondent shall cause petitioner to be reindicted and retried. The respondent shall keep the clerk of this court apprised of the manner in which this order is being complied with. If respondent fails to comply, petitioner may make a written motion for the issu-

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[4] Although this court does not address the admissibility of petitioner's confession, the court notes that the conclusory findings of fact contained in the record are possibly inadequate. On retrial the parties and the trial court are urged to consider that possibility.

Finally, at the risk of making an advisory opinion, the court is concerned by the repeated instances in which the trial court advised the jury that petitioner's trial counsel were appointed to represent him. Tr. at 4, 85. Such comments are unnecessary and potentially prejudicial to petitioner's Sixth Amendment right to effective assistance of counsel.

ance of a writ of habeas corpus discharging him from custody and, absent good cause shown, it shall issue.

SO ORDERED, this 17th day of May, 1984.

/s/ Wilbur D. Owens, Jr.
WILBUR D. OWENS, JR.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TONY B. AMADEO

v.

RALPH KEMP

September 30, 1983

Before VANCE, HENDERSON and CLARK, Circuit Judges.

PER CURIAM:

FACTS

Appellee, Tony B. Amadeo, is currently an inmate under sentence of death at the Georgia Diagnostic and Classification Center. Adameo was indicted for the murder and armed robbery of James D. Turk. At trial, the prosecutor was prepared to present evidence of petitioner's involvement in a robbery and murder committed in Colbert County, Alabama during the night preceding the murder of James Turk. Amadeo had not been tried for either Alabama crime. Counsel for Amadeo moved in limine to exclude the "other crimes" evidence. The trial court overruled the motion, finding that the evidence was probative both as to Amadeo's identity as the perpetrator as well as motive. He was convicted in the Superior Court of Putnam County, Georgia for the offense of murder and for criminal attempt to commit theft. Amadeo received the death penalty for the charge of murder and a ten year sentence for the charge of criminal attempt to commit theft. The Supreme Court of Georgia affirmed

appellee's convictions and sentences. *Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718 (1979). The United States Supreme Court denied certiorari. Appellee then filed a petition for writ of habeas corpus in the Superior Court of Putnam County, Georgia. After relief was denied, Amadeo filed an application for a certificate of probable cause to appeal to the Supreme Court of Georgia. This application was also denied. The Supreme Court again denied certiorari.

Amadeo then filed an application for federal habeas corpus in the District Court for the Middle District of Georgia raising all the grounds contained in his application for state habeas corpus relief, except for the claim that he received ineffective assistance of counsel because of the failure of his trial attorney to raise a challenge to the composition of the grand and traverse juries prior to appellee's trial. The district court dismissed the petition for the writ of habeas corpus without prejudice due to appellee's failure to exhaust his contentions concerning ineffective assistance of counsel.

Appellee then filed another state habeas corpus petition raising the contention of ineffective assistance of counsel due to the failure to challenge the jury composition. The superior court dismissed the petition as successive. Appellee then filed an application for a certificate of probable cause to appeal which was denied by the Georgia Supreme Court. Certiorari was again denied by the United States Supreme Court a third time.

Appellee then filed the second petition for federal habeas corpus relief in the United States District Court for the Middle District of Georgia. On May 17, 1984, after both petitioner Amadeo and the State of Georgia had briefed the contested issues, the district court entered an order granting federal habeas corpus relief, vacating appellee's conviction and sentence and directing that appel-

lee be reindicted and retried.[1] The state filed a timely notice of appeal.

There are two issues on appeal in this case:

1. Whether the district court erred in concluding that the appellee had satisfied the "cause and prejudice" requirements so as to exempt him from the operation of the state procedural waiver rule requiring a timely challenge to the composition of a jury; and

2. Whether the district court erred in finding that the evidence of "other crimes" admitted at appellee's trial denied him his right to a fundamentally fair trial.

Because it is necessary to remand this case to the district court for an evidentiary hearing on the first issue, we pretermit review of the second issue until the case is returned to us by the district court.

In this application for federal habeas corpus, Amadeo alleged the grand and petit jury list in Putnam County, Georgia, were unconstitutionally composed at the time of his indictment and trial, in violation of his due process rights under the Fifth and Fourteenth Amendments.

In an unrelated civil action in 1978, a federal court[2] had determined that the jury selection procedures employed in Putnam County were intentionally designed to underrepresent black citizens and women in an unconstitutional manner. *Bailey v. Vining*, Civ. Action No. 76-199-MAC (M.D. Ga. Aug. 15-17, 1978).

A timely jury challenge is required by Georgia law. *See* O.C.G.A. § 15-12-162. Failure to make a timely objection results in a waiver of the claim. A valid state procedural rule, resulting in a default, cannot be asserted

[1] Both Amadeo and the State agreed that an evidentiary hearing was not required.

[2] The district judge in that case, *Bailey v. Vining*, was the same district judge who heard and granted the instant habeas petition.

in a federal habeas corpus position without showing of "cause and prejudice." *Wainwright v. Sykes*, 433 U.S. 72, 89-90, 97 S.Ct. 2947, 53 L.Ed.2d 594 (1977).

The district court, recognizing the applicability of the "cause and prejudice standard," found that there had been no deliberate bypass in this case.[3] The district court stated:

> Petitioner's failure to assert this issue at trial was not deliberate. Petitioner's counsel, looking at the statistics at the time of trial, was justified in assuming that an attack upon the jury would be futile. It was not until after trial, and after this court's decision in *Bailey*, that the inculpatory facts of how the Putnam County juries were composed came to light. Petitioner immediately asserted this claim on direct appeal to the Georgia Supreme Court, years before federal action was first filed. That court in its discretion declined to find sufficient cause under analogous state law to excuse the waiver. As a matter of constitutional law, this court is not bound by that decision, this court continues to be appalled by the manner in which the Putnam County Jury Commissioners upon suggestion of the prosecuting attorney recompiled the grand and petit jury lists to underrepresent blacks and females. To overlook this act of intentional underrepresentation—and hand selection of those blacks who did serve—on the basis of rule of procedure would indeed be a miscarriage of justice. Accordingly, this court finds that sufficient cause and prejudice exists to require this court

[3] The district court stated, "the case and prejudice test is designed to preclude argument of issues deliberately withheld at trial and first asserted in federal court—a tactic known as 'sandbagging.'" (citations omitted). "Where there has been no deliberate bypass, . . ., and correction of the error is necessary to avoid a miscarriage of justice, the cause and prejudice test is satisfied." (citations omitted).

also to grant the writ on the basis of a unconstitutionally composed grand and petit jury.

The state argues that the district court's finding of "cause and prejudice" should be reversed because Amadeo failed to make the necessary objection. Further, the state insists that the district court's reliance on *Bailey v. Vining* constituted an incorrect interpretation and application of the "cause and prejudice" standard. The thrust of the state's argument is that deliberate bypass is not the applicable standard, but rather the court should have inquired whether the facts or law underlying the defaulted claim were discoverable to Amadeo's attorney.[4]

As the district court correctly noted, the "cause" requirement for noncompliance with a state contemporaneous objection rule was designed to eliminate the possibility of "sandbagging" by defense lawyers, and to reduce the possibility that the federal court will decide a constitutional issue without the benefit of the state's views. *Sykes, supra*, 433 U.S. at 89-90; *Ford v. Strickland*, 696 F.2d 804, 816 (11th Cir. 1983) (en banc), *Smith v. Kemp*, 715 F.2d 1459, 1470 (11th Cir. 1983). Cause sufficient to excuse a procedural default is designed to avoid a miscarriage of justice." *Huffman v. Wainwright*, 651 F.2d 347, 351 (5th Cir. Unit B 1981), *Smith, supra*, 715 F.2d at 1470.

Bailey v. Vining, supra, was decided after Amadeo's conviction. Immediately after the district court decided *Bailey v. Vining*, appellee's counsel asserted this claim in his direct appeal to the Georgia Supreme Court, long before a federal habeas petition was ever filed. The Georgia Supreme Court, declined to find sufficient "cause" under state law to overcome the failure to make a timely

[4] By analogy, the state makes use of the case of *Smith v. Kemp, supra*, in which the panel held that ignorance of recently decided Supreme Court cases regarding jury composition claims did not establish "cause."

challenge. *Amadeo v. State, supra*, 255 S.E.2d at 718. Despite the ruling of the Georgia Supreme Court, the district court determined that there was no "sandbagging" and that to overlook the intentional underrepresentation would "indeed be a miscarriage of justice."

As the Supreme Court has recently stated, "[b]ecause of the broad range of potential reasons for an attorney's failure to comply with a procedural rule, and the virtually limitless array of contexts in which a procedural default can occur, this Court has not given the term 'cause' precise content." *Reed v. Ross*, —— U.S. ——, 104 S.Ct. 2901, 2909 (1984). The Court stated that counsel may not intentionally ignore state procedural rules, hold back constitutional claims, and then attempt to secure federal habeas relief. To allow such actions would undermine the policies of comity and finality beyond the "cause and prejudice" requirement. *Id.* However,

> the cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests. And the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the requirement is met.

102 S.Ct. at 2909.

In the final analysis, the decision whether to grant federal habeas corpus relief despite a state procedural default lies within a federal court's equitable discretion. *Reed, supra*, 102 S.Ct. at 2907. The state's interest in finality, standing alone, is not sufficient reason for a habeas court to compromise its protection of constitutional rights under § 2254. *Id.* at 2909.

In *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) the Court made clear that "cause" and "actual prejudice" are not rigid concepts. 102 S.Ct. at 1575. "In appropriate cases those principles [of com-

ity and finality underlying the cause and prejudice requirement] must yield to the imperative of correcting a fundamentally unjust incarceration." *Id.* at 1576. "[W]e are confident that victims of a fundamental miscarriage of justice will meet the cause and prejudice standard. . . ." *Id.*[5]

The district court did not hold an evidentiary hearing on "cause and prejudice." Rather, based upon his knowledge of the jury selection system used in Putnam County due to the fact that he was the district judge in *Bailey v. Vining*, he found "cause and prejudice" and granted the writ. Neither Amadeo nor the state believed that an evidentiary hearing was necessary to decide the issue. Additionally, both parties fully briefed the issue of "cause and prejudice" in their respective briefs in support of the petition for the writ of habeas corpus and in the brief in support of the state's response.

Regardless of the parties failure to request a hearing, we remand the case to the district court for an evidentiary hearing on the issue of "cause and prejudice." The record in its present state is not sufficiently developed to allow us to properly review the claim. To fulfill the causation prong of the *Engle v. Isaac* test, it is necessary for petitioner to establish that the defects in the jury composition were not reasonably discoverable by his counsel and that the decision not to challenge the composition was not a deliberate bypass. To make the necessary judgment on this issue, it is necessary for the record below to reflect the nature of the system used to select grand and petit jurors in Putnam County for the time in question. There is reference in the court's opinion in *Bailey*

[5] In *Harris v. Spears*, 606 F.2d 639 (5th Cir. 1979), a panel of the former Fifth Circuit said that a determination of whether there was cause "turns on whether a finding of cause safeguards against a 'miscarriage of justice,' . . . and whether it can be presumed that no strategic advantage can be gained from failure to comply with the procedural rule." *Id.* at 664 (citations omitted).

v. Vining, *supra*, to a memorandum written by someone in the prosecutor's office to jury commissioners instructing them how to intentionally underrepresent blacks but yet minimize constitutional challenges. However, the reference is somewhat opaque and the defects the court found in the system are not specific. The specifics of the alleged unconstitutional method of selecting the jurors and whether this method was so devious and hidden as to be non-discoverable can assist the district court, and ourselves on review, to determine whether there was sufficient "cause" to excuse petitioner's procedural default.[6]

We retain jurisdiction of this case and remand to the district court for the limited purpose of that court conducting an evidentiary hearing to determine the causation issue heretofore described.

REMANDED.

[6] There does not appear to be any dispute as to "prejudice." The state does not seem to contest the district court's finding that the jury selection procedures used in Putnam County at the time of Amadeo's trial were unconstitutional. Thus, "prejudice" would seem to be satisfied. The relevant issue appears to be the "cause" requirement.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

TONY B. AMADEO

v.

RALPH KEMP

ORDER & MEMORANDUM DECISION

THE COURT: Of course, you all do not have a disagreement on the facts. The Circuit Court stated that the record did not reflect the nature of the system used to select grand and petit jurors in Putnam County for the time in question. In *Bailey v. Vining*, this Court on the civil side went into the totality of circumstances in the County. I recall specifically during that case the records of the Registrar were produced and we discovered to this Court's dismay that at the time in question in this County, in spite of all of the decisions of the Supreme Court of the United States, we had voting registration cards kept separately by race and we had the records, that is, the qualified voters' list for each election still being kept racially separate in this County. And, of course, all of that, those records were the source of the master jury list which was the subject of the memorandum from the District Attorney's office. So, if you view it in its totality, this was a case of intense discrimination on the part of your governmental officials in this County. In other words, those governmental officials included the personnel in the Registrar's Office, who, if I recall correctly, were all white, keeping segregated lists; included the personnel in the District Attorney's office; I've forgotten how many of the identity from a racial and sex standpoint of your Jury Commissioners. I seem

to recall they were all white and maybe, all men. I'm not certain of that. It's in the file somewhere. But anyway, that was the situation in this County at the time in question, at the time that Mr. Amadeo was being prosecuted.

This Court is troubled over the fact that at that time, it was the system in our state courts to appoint lawyers and who really were expected to serve on almost a voluntary basis. The compensation was so minimal that we'd have to say they were volunteer counsel. I know that; I was appointed to serve in murder cases. That was a matter of common knowledge. But anyway, that was the system; whether we like it or dislike it, is immaterial. I know as a matter of my own common experience, as confirmed by Mr. Lambert, that appointed lawyers who were making their living off of other things didn't feel free in your smaller communities to go and challenge the composition of the jury. A challenge to the composition of the jury reflected upon the Jury Commissioners; reflected upon the Judge who appointed them; reflected upon the Clerk of the Superior Court; it reflected upon those who ran the County and whether we want to admit it or not, there was a feeling among members of the Bar, that if you were at odds with the power structure in the County, that you didn't do well as a practicing lawyer. That was a reasonable assumption. I think that's just a matter of historical fact in your smaller communities throughout the State. Of course, the undisputed facts show that neither Mr. Prior nor Mr. Lambert were aware of the challenge that had been made by the former District Attorney's law partner, his stepson, and which precipitated an addition to the jury box, not a total revision but an addition to the jury box, which was patterned along the lines of memorandum prepared by the District Attorney's office, the then District Attorney's office. My best recollection of the facts as they were disclosed before this Court in August of 1978, is that the composition of the box was exactly in accordance with what the District Attorney's office had suggested. He said 'Do it this way,'

and they did it. And that's what you would expect of lay jury commissioners. They followed the advice that they got. Of course, we all agree that that was in reality intentional discrimination in the composition of the jury box which resulted in the box being unconstitutionally composed. Now, of course, the Circuit Court opinion and the prior opinions of this Court have not, from a cause standpoint, dealt with the obligation of the prosecution along the *Brady* lines, but as I've listened to all of this, I thought, gee, that's obviously a factor to be considered. The prosecuting attorney had a duty not only to prosecute, but to square with opposing counsel and with the Court. The prosecuting attorney is supposed to tell the good and the bad, and of course, in this case, we don't know what the prosecuting attorney's thoughts were because they have never been gone into but it's obvious he did not volunteer prior to the hearing in this Court, that he had directed the Jury Commissioners in how to compose the box.

I think from a cause standpoint, that as I've listened to the whole situation, that it was reasonable for Mr. Lambert and Mr. Prior at the time that they were appointed, to not challenge the list. I likewise think that if they had known of the memorandum that in spite of the local hesitancy on the part of lawyers to challenge the box, that they, nevertheless, would have had backbone enough to do so.

Now, under the more recent Supreme Court decisions, of course, whether that would have made any difference in the outcome is something none of us could know. It's a human equation. When you get twelve different people, none of us could foresee what those twelve people would do versus the twelve people who were selected. I think that's why there has been such an emphasis though upon there being a constitutionally-composed box. The least the courts can do is to insure that the master jury list from which jurors are selected is constitutionally composed.

So, I think in this case that on the issue of cause, that there was more than adequate cause for the failure to challenge and that the adequate cause was ignorance on the part of these lawyers and I think that ignorance is an adequate excuse for the issue not being raised. I don't think it was a deliberate by-pass in any sense, and I think it's an issue that is therefore not barred by the State's proceeding, rule or by the decisions of the Eleventh Circuit in this case.

So, what I will ask the Court Reporter to do is simply type up these remarks and I will make this report to the Eleventh Circuit for them to then deal with the case further.

SO ORDERED, this 14th day of November, 1985.

/s/ Wilbur D. Owens, Jr.
WILBUR D. OWENS, JR.
Chief Judge
United States District Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TONY B. AMADEO

v.

RALPH KEMP, WARDEN

Before VANCE and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

This appeal is before this panel for the second time. The petitioner-appellee, Tony B. Amadeo, a Georgia state prisoner under sentence of death,[1] sought a writ of habeas corpus in the United States District Court for the Middle District of Georgia. The district court granted the writ, concluding (1) that the introduction of "other crimes" evidence rendered Amadeo's trial fundamentally unfair and (2) that minority groups were underrepresented on the master jury lists in Putnam County, Georgia, the location of Amadeo's trial. In the first appeal, we remanded the case for a hearing to determine whether Amadeo could establish sufficient "cause" to excuse his failure to challenge the jury lists at the trial as required by Georgia law. We reserved judgment on the "other crimes" evidence issue. *Amadeo v. Kemp*, 773 F.2d

[1] Amadeo was convicted of murder and attempted armed robbery in the Superior Court of Putnam County, Georgia on November 30, 1977. The pertinent factual and procedural history of this case is contained in our first opinion. *Amadeo v. Kemp*, 773 F.2d 1141, 1142 (11th Cir. 1985) (per curiam) and in the opinion of the Supreme Court of Georgia, *Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718, *cert. denied*, 444 U.S. 974, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979).

1141 (11th Cir. 1985) (per curiam). On remand, the district court conducted a hearing and determined that sufficient "cause" existed to excuse Amadeo's procedural default. The case is now back before us to resolve both issues on the merits. We find that Amadeo has not established sufficient "cause" to excuse the procedural default and that the introduction of the "other crimes" evidence did not deny him a fair trial in violation of his due process rights. Accordingly, we reverse the judgment of the district court.

I.

The district court first held that Amadeo's right to a fundamentally fair trial was violated by the admission of evidence of other crimes. This evidence established that Amadeo by his own admission made in the form of a statement to the police, had been involved in a robbery and homicide in Colbert County, Alabama on September 28, 1977, the night prior to the murder and attempted robbery in Putnam County, Georgia, which occurred at approximately 8:30 A.M. on September 29, 1977. *See* Record on Appeal, Exhibit I, Vol. II. pp. 200-02.

On direct appeal, the Supreme Court of Georgia approved the admission of this evidence, finding that it met the Georgia standard for the admissibility of similar crimes evidence.[2] The supreme court also noted that the trial court instructed the jury that such evidence could be considered only to illustrate Amadeo's state of mind at the time of the Putnam County homicide and for no other reason. *Amadeo v. State*, 243 Ga. 627, 629, 255

[2] As stated in *French v. State*, 237 Ga. 620, 621, 229 S.E.2d 410, 411 (1976), the first criterion for the admission of evidence of independent crimes is that the defendant must be shown to have been the perpetrator of the independent crime. The second requirement is that there be a sufficient connection between the independent crime and the offense charged so that the proof of the former tends to prove the latter. *See also Felker v. State*, 252 Ga. 351, 359, 314 S.E.2d 621, 631, *cert. denied*, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984).

S.E.2d 718, 720, *cert. denied*, 444 U.S. 974, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979). Therefore, the Supreme court held that the admission of the evidence, for that limited purpose, was a recognized exception in Georgia to the general rule against the admissibility of evidence of other criminal activities.[3]

The district court found that it was unnecessary for the State to introduce this evidence to establish identity, motive or intent to rob or to rebut Amadeo's defense of an accidental shooting, and consequently ruled that the evidence was inadmissible and nothing more than prosecutorial overkill. The court reached this conclusion because at the time the state trial judge considered Amadeo's motion to exclude this evidence, the State had a written confession signed by the appellee.[4] Also, an

[3] The Georgia Supreme Court concluded that the evidence was probative of motive, i.e., that the Alabama and Georgia crimes were committed for the same reason, to obtain money while Amadeo was AWOL from the United States Marine Corps. *Amadeo v. State*, 243 Ga. at 629, 255 S.E.2d at 720.

[4] The confession recited:

> Last night Gemini, Bill and I slept in my car, a 1977 Monte Carlo, in a roadside park somewhere on the other side of Atlanta. This morning, Thursday, 9/29/77, we drove around in Georgia on some back roads looking for a little store to hit. Bill was driving when we spotted an old man in a brown pickup truck dumping trash in a dumpster. We passed by him and turned around to come back. When we got back, we turned around again and pulled up beside the truck. I got out of the back seat with a .22 automatic. I walked up to the truck and I asked him for his money. He said he didn't have none. I said yeah, you do. Then that truck [driven by Talmadge Holder], it had a white cab and steel sides, pulled up. The man was still in the back of the pickup. Then I shot him. I shot one time. The man grabbed his chest and kind of slid off the right side of the truck to the ground. He turned and yelled for help and started for that other truck. I just ran for our car. Gemini had got in the back seat so I got in the front. We took off.

Record on Appeal, Exhibit I, Vol. II, p. 225.

eye-witness identified Amadeo as the person who fired the fatal shot and there was conclusive ballistics testimony.[5]

In our view, this is not the proper inquiry in a federal habeas corpus proceeding. In considering state evidentiary objections, a federal court exercises limited review. The evidentiary error must have been "of such a magnitude as to deny fundamental fairness to the criminal trial, thus violating the due process clause." *Hills v. Henderson*, 529 F.2d 397, 401 (5th Cir.),[6] *cert. denied*, 429 U.S. 850, 97 S.Ct. 139, 50 L.Ed.2d 124 (1976). *See also Hall v. Wainwright*, 733 F.2d 766, 770 (11th Cir. 1984) (per curiam), *cert. denied*, 471 U.S. 1107, 105 S.Ct. 2344, 85 L.Ed.2d 858 (1985). In determining whether the admission of prejudicial evidence constitutes a denial of fundamental fairness, a federal court must decide whether the evidence is "material in the sense of a crucial, critical, highly significant factor." *Hills v. Henderson*, 529 F.2d at 401. *See also Osborne v. Wainwright*, 720 F.2d 1237, 1238-39 (11th Cir. 1983) (per curiam).

We reject the district court's reasoning for several reasons. First, the Supreme Court of Georgia expressly ruled that the evidence was properly admitted under state law, a determination that is binding on this court as well as the district court. Since introduction of this evidence was relevant as a matter of Georgia law, we cannot say that its admission denied Amadeo fundamental fairness under these circumstances. *See Jameson v. Wainwright*, 719 F.2d 1125, 1127 (11th Cir. 1983) (per

[5] However, counsel for Amadeo maintained in opening and closing argument that the confession was involuntary and that the shooting was accidental. While no evidence was introduced by the defense on this issue, the potential for such defenses remained at the time of the admission of the "other crimes" evidence.

[6] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981.

curiam), *cert. denied*, 466 U.S. 975, 104 S.Ct. 2355, 80 L.Ed.2d 827 (1984).

Even if this evidence was admitted in violation of Georgia law, there was still no violation of due process. The overwhelming weight of the evidence of Amadeo's guilt of the Georgia murder defeats his argument that evidence of the Alabama crimes constituted a "crucial, critical, highly significant factor" in the case against him.

In any event, the overwhelming nature of the other evidence establishing Amadeo's guilt would render any constitutional error harmless beyond a reasonable doubt. *See Rose v. Clark*, —— U.S. ——, ——, 106 S.Ct. 3101, 3107, 92 L.Ed.2d 460 (1986):

> The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt byond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, 'the Constitution entitles a criminal defendant to a fair trial, not a perfect one.'

See also Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

II.

The district court also predicated its grant of the writ on its finding that the 1977 master jury lists in Putnam County underrepresented women and blacks, depriving Amadeo of his equal protection rights. Amadeo did not attack the composition of the jury lists at the trial; he first raised the issue on direct appeal to the Supreme Court of Georgia. That court refused to address this assignment of error because of Amadeo's failure to complain of this possible infirmity at the time of trial. The district court excused this procedural default, finding

that Amadeo was prevented from making out a prima facie case of jury discrimination by the conduct of Putnam County officials. Before reaching the merits of the jury composition issue, we must first examine Amadeo's failure to challenge these jury lists during his state court trial and the district court's conclusion that cause existed to forgo this challenge.

A federal habeas corpus court will not consider an issue if the petitioner did not pursue that issue in the state court and thereby committed a procedural default, unless he can overcome this bar by showing cause for and actual prejudice from the default. *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976). Georgia law clearly requires a criminal defendant to make a timely jury challenge at the trial. *See* O.C.G.A. §§ 15-12-162, 9-14-42(b). It is also undisputed that Amadeo failed to make such a timely challenge and that this failure constituted a procedural default under Georgia law. *Amadeo v. State*, 243 Ga. at 629-30, 255 S.E.2d at 720. Consequently, our inquiry turns to whether Amadeo can overcome this procedural bar by demonstrating sufficient "cause" and "actual prejudice."

Because federal courts must analyze "cause" under a wide variety of circumstances, no court has yet accorded that term a precise definition. Rather, guidance is provided by the policy rationale for the "cause" requirement. The avowed purpose of this requirement is to preserve the integrity of state judicial procedures and to bind a defendant to the tactical decisions of competent counsel, absent a miscarriage of justice. *Reed v. Ross*, 468 U.S. 1, 13, 104 S.Ct. 2901, 2909, 82 L.Ed.2d 1, 13 (1984); *Smith v. Kemp*, 715 F.2d 1459, 1470 (11th Cir.), *cert. denied*, 464 U.S. 1003, 104 S.Ct. 518, 78 L.Ed.2d 699 (1983).

> In general, therefore, defense counsel may not make a tactical decision to forgo a procedural opportunity —for instance, an opportunity to object at trial or to raise an issue on appeal—and then, when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal court.
>
> ....
>
> On the other hand, the cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests. And the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the requirement is met.

Reed v. Ross, 468 U.S. at 14, 104 S.Ct. at 2909, 82 L.Ed. 2d at 13-14.

The Supreme Court furnished further instruction on this point in a recent decision:

> [W]e think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objecitve impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel . . . or that 'some interference by officials' . . . made compliance impracticable, would constitute cause under this standard.

Murray v. Carrier, —— U.S. ——, ——-——, 106 S.Ct. 2678, 91 L.Ed.2d 427 (1986).

We remanded this case to the district court to make the inquiry outlined in *Reed*. "To fulfill the causation prong . . . it is necessary for petitioner to establish that

the defects in the jury composition were not reasonably discoverable by his counsel and that the decision not to challenge the composition was not a deliberate bypass." *Amadeo v. Kemp*, 773 F.2d at 1145. That hearing established the sequence of events relating to Amadeo's failure to challenge the jury lists.

Amadeo's trial counsel, William A. Prior and E.R. Lambert, testified that they considered making a challenge to the grand and petit juries and were aware that minorities were probably underrepresented in the Putnam County master jury lists. Record on Appeal, 2d Supp., pp. 8, 11-13, 20. However, after reviewing the petit jury venire with a local attorney, they elected not to pursue the challenge for various tactical reasons.

First, they were satisfied with the representation of blacks on the venire, which was approximately fifty percent. *Id.* at 10. One attorney stated that he would be reluctant to try the case with any more blacks on the venire because the State possessed evidence that Amadeo, a white male, had assaulted a number of blacks in Alabama and Mississippi. The lawyer feared that a jury heavily weighted with black jurors might become prejudiced against Amadeo if the State introduced this evidence at the trial. *Id.* at 12. Second, the attorneys were satisfied with the existing venire because it contained several members of a charismatic religious group that had shown some sympathy for the welfare of local prisoners. *Id.* at 13. Such individuals were viewed as less likely to impose the death penalty. *Id.* at 30. Counsel also were aware that these advantages might be lost if the venire was challenged and the master list was reconstituted. *Id.* at 9.

Amadeo's lawyers confirmed their decision to waive a jury challenge when the actual jury selected for Amadeo's case contained an even number of blacks and whites and a majority of women. *Id.* at 12, 35-36. As such, they made no challenge to either the grand or petit juries

and did not make an effort to examine the master jury lists. As one lawyer testified, "it was a tactical decision on our part not to challenge the array because of the fact that we had gone over the list with [a local attorney]; we felt like we had about as good a Jury List as we could get . . . . we made a tactical decision, a knowing, tactical decision not to challenge the array." *Id.* at 12-13.

After Amadeo was convicted and sentenced to death, and while his direct appeal was pending before the Supreme Court of Georgia, Christopher Coates, counsel in an unrelated civil suit, *Bailey v. Vining*, Civ. Action No. 76-199-MAC (M.D.Ga. Aug. 15-17, 1978),[7] discovered a 1977 memorandum from the county prosecutor advising the jury commissioners to add specified numbers of blacks to the lists. The memorandum was filed in the book containing the master jury lists and was available to anyone examing those lists. Record on Appeal, 2d Supp., pp. 41-42, 49-50. The district court characterized this memorandum as an effort to protect the jury lists from constitutional scrutiny by placing the names of enough blacks on the lists to preclude a prima facie case of jury discrimination, but still maintain as much racial disparity as possible.[8] Coates advised Amadeo's counsel of

[7] *Bailey v. Vining* was a voting rights action challenging the at-large election system used in Putnam County.

[8] Courts have indicated that a ten percent or smaller disparity between the proportion of a minority group in the relevant local population and its representation on jury lists is acceptable under the Constitution. Larger disparities may justify finding an equal protection violation. *See Swain v. Alabama*, 380 U.S. 202, 208-09, 85 S.Ct. 824, 829, 13 L.Ed.2d 759, 766 (1965); *Bowen v. Kemp*, 769 F.2d 672, 684-86 (11th Cir. 1985); *Preston v. Mandeville*, 428 F.2d 1392, 1393-95 (5th Cir. 1970). *See generally Castaneda v. Partida*, 430 U.S. 482, 494-95, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498, 510-11 (1977) (elements of a prima facie case of jury discrimination).

After the Putnam County jury commissioners complied with the prosecutor's suggestion, the grand jury list underrepresented blacks by 10.7% and the petit jury list underrepresented blacks by 5.1%. *See* Record on Appeal, Petitioner's Exhibit 4.

this memorandum and they amended their appeal to include a challenge to the composition of the jury. As stated earlier, the Georgia Supreme Court declined to reach this issue because of the procedural default. *Amadeo v. State*, 243 Ga. at 629-30, 255 S.E.2d at 720.

The district court found "cause" to excuse the procedural default because the county's efforts to maintain yet conceal racial disparity on the jury lists prevented Amadeo's counsel from discovering the facts that could lead to a jury challenge. Once the memorandum was discovered by counsel in *Bailey v. Vining* and related to Amadeo's lawyers, they acted promptly to raise the jury issue on direct appeal. In the view of the district court, this "concealment" excused the procedural default.[9]

We disagree with that conclusion. The memorandum detailing the county's efforts to alter the racial composition of the master jury lists was not concealed from Amadeo's counsel, but was readily discoverable in the county's public records. Had counsel elected to examine the jury lists, they would have found the memorandum. However, they made a considered tactical decision not to mount a jury challenge because they wanted to preserve an advantageous jury venire. As such, they did not review the jury lists and thereby did not become aware of the memorandum until its discovery during the *Bailey v. Vining* voting rights case. These facts, in our opinion, do not establish sufficient "cause" to excuse Amadeo's procedural default.

[9] In their testimony before the district court after remand, Amadeo's attorneys stated that had they known of the memorandum and the racial disparity created by it, they would have launched an attack on the racial composition of the jury. *See* Record on Appeal, 2d Supp., pp. 25-27, 46, 58-59, 62. These statements made after the conviction and sentence are in direct conflict with their earlier testimony that they suspected racial disparity in the list but made a conscious election to forgo a challenge because of the favorable jury array.

Our decision finds support in a 1984 decision of this court. In *Birt v. Montgomery*, 725 F.2d 587 (11th Cir.) (en banc), *cert. denied*, 469 U.S. 874, 105 S.Ct. 232, 83 L.Ed.2d 161 (1984), a Georgia state prisoner maintained that his trial counsel's failure to question the racial composition of the jury was unreasonable and thereby constituted "cause" excusing the procedural default as well as ineffective assistance of counsel. In that case, as here, the lawyer considered a jury challenge and made a preliminary inquiry into the composition of the jury. *Id.* at 598. He decided to abandon the challenge, again for tactical reasons. In the opinion of the attorney, the racial mix of the jury venire and the actual jury empaneled to try the case was advantageous to the defendant and this advantage might be lost in a jury drawn from a revised list. *Id.* at 598-99. We found counsel's tactical decision was reasonable under the circumstances and denied the writ. *Id.* at 600-01. *See also Straight v. Wainwright*, 772 F.2d 674, 677-78 (11th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 1502, 89 L.Ed.2d 903 (1986). The present case calls for a similar result.[10]

In summary, we hold that introduction of "other crimes" evidence by the prosecution did not deny Amadeo a fair trial and that he has not established sufficient "cause" to overcome his procedural default in failing to object to the composition of the master jury lists. Accordingly, the district court erred in granting the writ of habeas corpus.[11]

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[10] Since we conclude that Amadeo has failed to establish "cause" for his procedural default, we do not address the issue of "actual prejudice" or reach the merits of his jury challenge.

[11] Amadeo raised eight issues in his federal petition for habeas corpus. He claims that the jury lists were unconstitutional, that the admission of the "other crimes" evidence denied him a fair trial, that his confession was involuntary, that trial counsel was ineffective, that the trial court gave improper jury instructions on armed robbery, mitigating circumstances and the jury's right to recommend a life sentence, and that the Supreme Court of Georgia failed to properly evaluate the proportionality of his death sentence. The district court considered only the first two issues when it granted the writ. The failure to address the six remaining issues requires a remand for the resolution of these questions.

The judgment of the district court is REVERSED and the case is REMANDED for proceedings consistent with this opinion.

CLARK, Circuit Judge, dissenting:

This case involves a scheme by the county solicitor's office and the county jury commission to limit the number of blacks on grand and petit jury lists in Putnam County, Georgia. The scheme included a coverup intended to mask the impropriety by keeping the percentage of black jurors within statistical guidelines mentioned in the prevailing case law. The majority holds that a defendant who did not learn of the underlying scheme until after his trial is barred from raising that claim in federal court because of procedural default. Such a result rewards the state for its underhandedness and stretches the doctrine of *Wainwright v. Sykes* beyond recognition. Accordingly, I dissent.

I. FACTS

We remanded this case to the district court for a hearing to determine whether "the defects in the jury composition were . . . reasonably discoverable by [Amadeo's] counsel and [whether] the decision not to challenge the composition was . . . a deliberate bypass." *Amadeo v. Kemp*, 773 F.2d 1141, 1145 (11th Cir. 1985). After holding such a hearing, the district court found that petitioner had demonstrated sufficient "cause" for his failure to object at trial to the composition of the master jury list. Although the majority does not explicitly state the standard of review employed in this case, I assume the factual findings underlying the district court's legal ruling are accepted as true unless they are clearly erroneous.

At the evidentiary hearing, the state conceded that the county intentionally discriminated against blacks in the election of prospective jurors and that the prejudice prong of *Wainwright v. Sykes* was established. 2d Supp. Record, Vol. I at 67. The undisputed evidence of this discrimination was first presented in *Bailey v. Vining*, No. CIV 76-199-MAC (M.D.Ga. Aug. 17, 1978).

In *Bailey*, a civil case, plaintiffs challenged Putnam County's voter registration and juror selection procedures. Judge Owens, the district judge in the instant case, was also the judge in *Bailey*. As a result of *Bailey*, the county was required to revise its juror selection procedures. The following version of the pre-1978 jury selection procedures in Putnam County is uncontroverted.

1. *The Discriminatory Scheme.*

Prior to Amadeo's indictment, the Putnam County Solicitor's (now the District Attorney's) Office advised the county jury commission to recompile the grand and petit jury lists in a manner that would underrepresent blacks by a percentage just small enough to avoid challenges based solely on statistical evidence. Specifically, a memorandum from the prosecutor's office advised the commission to place the names of 101 blacks in the grand jury pool and 298 blacks in the petit jury pool. Petitioner's Exhibit 4.[1] Such racial precision was possible because the master jury list was drawn from voter registration cards which were kept in two separate groups, one for blacks and one for whites. The memorandum indicated that the percentage of blacks in the eligible population was 42.1%, and that the selection of 101 blacks for the grand jury list would raise the percentage of blacks on that list to 31.4%. In addition, blacks would constitute 37% of those on the petit jury list. The disparity between the percentage of blacks in the grand and petit jury pools and the percentage of blacks in the population would be 10.7% and 5.1%, respectively.

2. *The Coverup.*

The size of this disparity was sufficiently small to prevent a challenger of the jury lists from establishing a prima facie case of racial discrimination. *Compare Swain*

[1] The memorandum also suggested limiting the number of women and people under age 25 on the master jury lists.

v. Alabama, 380 U.S. 202, 208-09, 85 S.Ct. 824, 829, 13 L.Ed.2d 759, 767 (1964) (10% underrepresentation not enough to establish prima facie case) with *Preston v. Mandeville*, 428 F.2d 1392, 1393-94 (5th Cir. 1970) (14.3% underrepresentation sufficient to establish prima facie case). The district court, relying in part on its work in a prior civil case against Putnam County, found that the district attorney's office memorandum suggested the 10.7% and 5% disparities in order to prevent defendants from establishing prima facie cases of discrimination. Record, Vol. I at 147.

The jury commissioners followed the advice in the prosecutor's memorandum. Thus, the pre-1978 jury lists in Putnam County were compiled according to racial quotas which are clearly unconstitutional. *See, e.g., Cassell v. Texas*, 339 U.S. 282, 290, 70 S.Ct. 629, 633, 94 L.Ed. 839, 849 (1950).[2] More importantly for purposes of this case, the discriminatory scheme was designed to make detection by defendants nearly impossible. The jury pools appeared to be fairly integrated. Even if a challenge was made in any particular case, it was almost sure to fail because of a lack of proof. Only a defendant possessing direct evidence of intentional discrimination

[2] Although Amadeo is white and blacks were unconstitutionally excluded from the jury array, he nonetheless has standing to raise his challenge here; for, "whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law." *Peters v. Kiff*, 407 U.S. 493, 504, 92 S.Ct. 2163, 2169, 33 L.Ed.2d 83 (1972). *See Duren v. Missouri*, 439 U.S. 357, 359 n. 1, 99 S.Ct. 664, 661 n. 1, 58 L.Ed.2d 579 (1979) ("A criminal defendant has standing to challenge exclusion resulting in a violation of the fair-cross-section requirement, whether or not he is a member of the excluded class."); *Taylor v. Louisiana*, 419 U.S. 522, 526, 95 S.Ct. 692, 696, 42 L.Ed.2d 690 (1975) (male defendant had standing to raise "the claim that the exclusion of women from jury service deprived him of the kind of factfinder [sic] to which he was constitutionally entitled").

could hope to mount a successful challenge to the grand or petit jury.

3. *The "Smoking Gun."*

The testimony at the evidentiary hearing showed that Amadeo's attorneys did not know of the intentional discrimination by the jury commissioners until several months after Amadeo's trial. In early 1978, Amadeo's counsel was contacted by Christopher Coates, an attorney for the plaintiffs in a voting rights case against Putnam County. As part of his background research in the voting rights case, Coates surveyed "all the jury materials for a 20 to 30 year period." 2d Supp. Record at 42. Coates found the "smoking gun" memorandum from the district attorney's office somewhere in the middle of the mass of documents he obtained from the county clerk. 2d Supp. Record at 50.

Amadeo's counsel immediately incorporated the jury discrimination issue into his appeal to the Georgia Supreme Court. That court refused to entertain the claim because it had not been raised at trial. *See Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718 (1979), *cert. denied*, 444 U.S. 974, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979). The district court, after hearing testimony from counsel, held that this issue was not barred from federal review because Amadeo had demonstrated cause for his failure to object at trial. The majority's reversal of that decision ignores the policies underlying *Wainwright v. Sykes*, and ignores the fact-finding role of the district court.

II. ANALYSIS

Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976), announced the rule that federal habeas courts may not entertain procedurally defaulted grand jury challenges by state prisoners absent a showing of "cause" and "actual prejudice." The decision brought the law regarding procedural defaults by state

prisoners into line with the law regarding procedural defaults by federal prisoners. *See Davis v. United States*, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973). Federalism concerns required giving at least as much deference to state procedural rules as is given to the corresponding federal rules in federal courts. *Francis*, 425 U.S. at 541-42, 96 S.Ct. at 1711.

In *Wainwright v. Sykes*, 433 U.S. at 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the Court extended the *Francis* "cause" and "prejudice" test to a case involving a failure to contemporaneously object to an error at trial. *Sykes* reiterated the federalism concerns of *Francis*, and gave several examples of how failure to honor the state's contemporaneous objection rules would be an affront to principles of comity. First, it might "encourage 'sandbagging' on the part of defense lawyers, who may take their chances of a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." *Id.* at 89, 97 S.Ct. at 2508. Second, it might "detract from the perception of the trial of a criminal case in state court as a decisive and portentous event." *Id.* at 90, 97 S.Ct. at 2508.

These comity based concerns need to be balanced against the role of the federal habeas court as a tribunal of last resort for state prisoners. Thus, the "cause" and "prejudice" test is designed to ensure the adjudication of federal claims in federal court where the failure to do so would result in a miscarriage of justice. *Id.* at 90-91, 97 S.Ct. at 2508. Consistent with this goal, "this court has . . . attempted to secure defendants who have not strategically withheld constitutional objections in state court from the possibility of injustice." *Huffman v. Wainwright*, 651 F.2d 347, 351 (5th Cir. Unit B July 1981).

As the majority indicates, any attempt to define cause must take into consideration the federalism principles

identified in *Sykes* as well as the overriding duty of the federal habeas court to avoid manifest injustice. *Ante* at 1505. On the facts of this case, both of these factors lead me to the conclusion that Amadeo has demonstrated cause for his failure to raise his jury challenge at the trial level.

The most important comity concerns discussed in *Sykes* simply are not involved in this case. The district court found that Amadeo's counsel did not "deliberately bypass" the state trial court. 1st Supp. Record, Tab. 16 at 5. There is no evidence of "sandbagging." At the time of trial, counsel had no reasonable basis for challenging the master jury lists. Since the "smoking gun" memorandum was discovered after trial by a different attorney in an unrelated case, there is no indication that Amadeo was holding back his federal habeas "trump card" hoping for a favorable verdict. In fact, the district court specifically found that Amadeo's counsel *would* have raised the jury claim at trial if they had known about the solicitor's memorandum. Based on counsel's testimony at the evidentiary hearing, this factual finding is not clearly erroneous.

The majority suggests, *ante* at 1506-1507, that Amadeo's counsel (William Prior and Roy Lambert) considered an objection to the jury array but decided, as a matter of tactics, to proceed with the jury that was picked. This argument misses the mark for several reasons. First, the claim which counsel considered at trial was a challenge to the composition of the jury array based on *statistical underrepresentation*. One can hardly fault Amadeo's attorneys for rejecting such a challenge, since the racial composition of the array did not suggest a sufficient underrepresentation of blacks to warrant much concern. Indeed, the unconstitutional jury selection process had been specifically designed to withstand challenges based on statistical evidence. Under these circumstances, counsel's pretrial discussions regarding a possible statis-

tical challenge should not preclude Amadeo from raising a claim based on (newly discovered) direct evidence of intentional discrimination in the juror selection process.

Second, a challenge to the jury array is not the same as a challenge to the master jury list. At the evidentiary hearing, Amadeo's counsel noted that the actual array chosen for Amadeo's trial appeared to be fairly integrated. What counsel could not see by looking at the array was that the array was chosen from a master list which was specifically designed to underrepresent blacks. The infection of the selection system at the master list level is not cured by the random selection of arrays from that master list. Once the master list is affected by discriminatory selection procedures, the juries chosen from that list are tainted. It is nearly impossible to predict what type of jury would have been selected if the master list had been compiled in a constitutional manner. Nor is it certain how such a jury would have decided this case. For these reasons, the Supreme Court has indicated that, where the jury has been chosen according to racially discriminatory procedures, prejudice to the defendant is presumed. *See Peters v. Kiff*, 407 U.S. 493, 504-05, 92 S.Ct. 2163, 2169, 30 L.Ed.2d 83 (1972); *cf. Rose v. Mitchell*, 443 U.S. 545, 550-59, 99 S.Ct. 2993, 2997-3002, 61 L.Ed.2d 739 (1979) (discrimination in selection of grand jury not rendered harmless by subsequent conviction by petit jury).

Third, the majority ignores important factual findings made by the district court. After hearing testimony from Amadeo's counsel, the court found that the pressures of being a lawyer in a small rural community served as an effective deterrent against raising claims of jury discrimination. Such claims would necessarily impugn the integrity of county officials, and would jeopardize the lawyer's standing in the community. 1st Supp. Record, Tab 16 at 2. Notwithstanding these community pressures, the court concluded "that if [counsel] had

known of the memorandum that in spite of the local hesitancy on the part of lawyers to challenge the box, that they, nevertheless, would have had backbone enough to do so." *Id.* at 4. This finding clearly indicates that counsel did not make a strategic decision to hold back the jury claim in the hopes of obtaining a favorable verdict at trial.

A second comity concern stressed in *Sykes* is the desire to ensure that the trial remains the "main event" in the criminal process. This concern is most important where a defendant deliberately bypasses the opportunity to raise an available claim at trial. It is even relevant where counsel's failure to raise the issue was the result of negligence. *See Murray v. Carrier*, —— U.S. ——, 106 S.Ct. 2639, 2645-46, 91 L.Ed.2d 397 (attorney "inadvertence" or "ignorance" does not constitute cause under *Sykes*). By refusing to entertain claims "negligently" bypassed, federal courts provide an incentive to the bar to exercise the utmost care in recognizing and raising meritorious claims at trial.

The above concern is irrelevant, however, where neither the defendant nor his counsel were at fault for the procedural default. *See Reed v. Ross*, 468 U.S. 1, 14-16, 104 S.Ct. 2901, 2909-10, 82 L.Ed.2d 1 (1984).[3] The ma-

[3] For this reason the majority's reliance on *Birt v. Montgomery*, 725 F.2d 587 (11th Cir.) (en banc), *cert. denied*, 469 U.S. 874, 105 S.Ct. 232, 83 L.Ed.2d 161 (1984), is misplaced. In *Birt*, the only asserted "cause" for failing to raise the jury claim was that counsel rendered ineffective assistance. We *rejected* the ineffectiveness claim and thus found there was no "cause for the defendant's failure to object at trial. *Id.* at 596-601. In the instant case, Amadeo does not allege his attorneys were ineffective for failing to raise the jury claim. Amadeo claims counsel could not have raised the claim at trial because the evidence of intentional discrimination was not discovered until after trial. Furthermore, he argues his attorneys lacked sufficient evidence to challenge the jury on the basis of statistical underrepresentation. The allegations of state misconduct in concealing the constitutional violation are sufficient to distinguish this case from *Birt*.

jority suggests counsel was "at fault" because the "smoking gun" memorandum which set forth the country's plan to rig the jury lists was "readily discoverable in the county's public records." *Ante* at 1507. Further, the majority speculates that "[h]ad counsel elected to examine the jury lists, they would have found the memorandum." *Id.*

The majority's "factual findings" are troubling for several reasons. First, there simply is no factual support in the record for the proposition that the memorandum was "readily discoverable" or that Amadeo's counsel "would have found the memorandum" if they had looked. Christopher Coates, the attorney who found the memorandum, testified that he was conducting a broad investigation as to whether blacks historically had been underrepresented in Putnam County. As part of his research, he set out to survey all of the jury materials for a twenty to thirty-year period. Although he did not recall precisely where he found the incriminatory memorandum, he remembered that "it was not on the first page of the materials I was perusing, but somewhere in the stack of materials [that the county clerk] gave me . . . it wasn't on top. I found it because I was going through all the materials." 2d Supp. Record at 41, 50. This testimony belies the majority's assertion that the document was "readily available." Furthermore, it is not at all clear that a search by counsel would have led them to this document. The majority does not suggest counsel should have reviewed twenty years worth of documents as part of their pretrial preparation in this case. It is at least as reasonable to assume counsel would have reviewed only the current jury lists. Since the memorandum was found in the middle of a stack of older documents, I find the majority's factual inferences to be unreasonable.

Moreover, even if there had been no obfuscatory behavior by county officials, it is unreasonable to expect

counsel to conduct a detailed search of the county court records. By its holding, the majority deprives petitioner of a forum for his claim because his attorneys, who were facing the usual rigors of pretrial preparation in a capital case, did not find the time to scour the public records in search of evidence of intentional discrimination. Such a ruling ignores the realities of capital defense work and, more importantly, is not necessary to ensure that the trial is the "main event" in the criminal process. Absent some reason to suspect jury tampering (such as statistical evidence of underrepresentation), defense counsel would almost never be able to afford the luxury of examining all "publicly available" documents for favorable evidence. This realization is the basis for the holding in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (requiring prosecutorial disclosure of evidence favorable to defendant). Defense counsel must be able to rely on the candor of the prosecutor's office. Where the prosecutor's office is a party to the scheme to underrepresent blacks on jury lists, it is particularly unreasonable to expect defense counsel to uncover such malfeasance.

In this respect, this case is analogous to *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984). In *Reed*, the Court held that "where a constitutional claim is so novel that its *legal* basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." *Id.* at 16, 104 S.Ct. at 2910 (emphasis added). In the instant case, the *factual* basis of Amadeo's constitutional claim was not reasonably available to counsel. In such a case, as in *Reed*, "it is safe to assume that [counsel] is sufficiently unaware of the [constitutional] question's latent existence that we cannot attribute to him strategic motives of any sort." *Id.* at 15, 104 S.Ct. at 2909-10.

Finally, I cannot ignore the fact that the county did its best to conceal this constitutional violation. The dis-

criminatory scheme was carefully designed to achieve the maximum underrepresentation of blacks without allowing criminal defendants to use the statistical disparity to establish prima facie cases of jury discrimination. The only direct evidence of this scheme was buried somewhere in a stack of documents in the county clerk's office. Under the circumstances, certainly it is no coincidence that this evidence was discovered by an attorney conducting discovery in a civil case. Without the benefit of a prima facie case, criminal defendants and their counsel are unlikely to undertake massive investigations to uncover direct evidence of intentional discrimination.

The fact that the jury issue did not surface at trial is largely attributable to the intentional concealment by the county. Recent decisions by the Supreme Court and by our court provide support for the proposition that such misconduct by the state can constitute "cause" for failure to raise an issue at trial. In *Murray v. Carrier*, —— U.S. ——, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), the Court noted that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." *Id.* at ——, 106 S.Ct. at 2646. We have applied this language to excuse default under circumstances significantly less compelling than those in the present case. In *Dorman v. Wainwright*, 798 F.2d 1358 (11th Cir. 1986), the defendant dismissed his direct appeal in state court because he had not received a transcript of his trial. Under state law, the defendant's voluntary dismissal of his appeal barred him from further review of alleged trial errors. However, since it was the state's responsibility to furnish the transcript, we found it unnecessary to apply the state's procedural default rule in federal court:

> The state's failure to provide Dorman with a trial transcript within a reasonable time to perfect his appeal constitutes an external factor out of Dorman's control that suffices as "cause" for the dismissal of the direct appeal.

Id. at 1370. It is inconceivable to me that the state misconduct in the present case would not constitute "cause" while the failure to provide a transcript would suffice to make such a showing. *Cf. Freeman v. Georgia*, 599 F.2d 65, 71-72 (5th Cir. 1979) (where defense counsel was misled to believe missing witness would be unfavorable, defendant could not be held responsible for counsel's failure to make attempts to locate that witness), *cert. denied*, 444 U.S. 1013, 100 S.Ct. 661, 62 L.Ed.2d 641 (1980); *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842, 845 (4th Cir. 1964) (where defense counsel was misled into thinking ballistics test results supported state's theory, counsel's failure to make a specific request for the test results was excused).

The misconduct in this case is particularly egregious because the county prosecutor's office initiated the discriminatory scheme. The prosecutor's knowledge of the prevailing standards for establishing a prima facie case of jury discrimination was the key to the effective concealment of the discriminatory scheme. The prosecutor's office is under a special duty to be candid in criminal cases and I would hope that this duty would be scrupulously honored where the defendant's life is at stake. The thought of one arm of the prosecutor's office suggesting methods to shield unconstitutional jury selection processes while another arm of the prosecutor's office argues to this court that defense counsel should have searched the public records for evidence of the scheme is unconscionable.

In sum, comity concerns do not require that we reward the state for its own misconduct. In fact, the interests of justice mandate that we consider the merits of Amadeo's claim. Where the state's efforts to conceal its misconduct cause an issue to be ignored at trial, the

state should not be allowed to rely on its procedural default rules to preclude federal habeas review. *See Freeman, supra.* Such a result is not required by *Sykes*, nor is it permitted under our prior cases.

Because I believe Amadeo has shown "cause" for his failure to raise the jury issue at trial, and because the existence of "prejudice" is uncontested, I would affirm the district court's order granting the writ in this case.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

(Title Omitted in Printing)

Appeal from the United States District Court for the Middle District of Georgia

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ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion April 30, 1987)

(June 8, 1987)

Before VANCE and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge

PER CURIAM:

(×) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 25, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Robert S. Vance
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

(Title Omitted in Printing)

Before VANCE and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED; and that this cause be and the same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court.

CLARK, Circuit Judge, dissented and filed an opinion.

Entered: April 30, 1987

For the Court: MIGUEL J. CORTEZ
Clerk

By: /s/ David Maland
Deputy Clerk

Issued as Mandate: Jun. 16, 1987

SUPREME COURT OF THE UNITED STATES

No. 87-5277

TONY B. AMADEO,
Petitioner,

v.

RALPH KEMP, Warden

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 19, 1987